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*Recd Oct. 1905,*



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Received *Nov. 3, 1905.*











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# The Madras Law Journal Reports.

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Volume XIV.

1904.

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Published by

THE HON'BLE. MR. P. S. SIVASWAMI AIYAR, B.A., B.L.,

*45. High Court Buildings, Madras.*

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Madras:

PRINTED BY GRAVES, COOKSON & CO., SCOTTISH PRESS.

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1905.

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*Rec. Nov. 8, 1905*

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**Accomplice evidence necessity of corroboration** :—*See* MURDER.

**Act I of 1897, S. 4—Conditional undertaking to promise—Promote.**

When there is no unconditional undertaking on the face of the document and the undertaking is only conditional on the amount being remitted as requested, the document is not a promissory note within the meaning of S. 34 of Act I of 1879.

*Channamma v. Ayyanna*, I. L. R., 16 M. 283, overruled. *Narayana-saami v. Lokambalammal*, I. L. R., 23 M. 156, note and *Bhat Narhari Bhat v. Atmaram Morshwar*, I. L. R., 13 B. 669, followed.

Where a person wrote a letter to the following effect :—"In addition to Rs. 115 already received Rs. 385 is also required. Please send it by the bearer Srinivasan. The amount will be returned with interest at 12 per cent. without delay" :—

*Held*, that the letter was not a promissory note.

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**Checks, how far subject of the Act** :—See PENAL CODE (4).

**Charter Act, S. 15** :—See CRIMINAL PROCEDURE CODE (3).

- 1. Civil Procedure Code, S. 11**—*Explanation*—*Civil Suit*—*Suit of a Civil nature*—*No claim to office or emoluments*—*Claim to recite certain texts*—*Mere matter of ritual or religious ceremony*—*Claim for imaginary damages*—*Jurisdiction of Civil Courts.*

The whole of an ill-defined community, such as all the members of the Vadagalai community wherever residing cannot be entitled to any particular office in a temple or to any emoluments or perquisites thereof.

Where a plaintiff's claim is not to any office or emoluments but is confined to rights in religious ceremonies, the same is not cognizable by the Civil Courts under S. 11, Expln C. P. C. Even the addition of a claim for damages which is purely imaginary does not bring it within the cognizance of the Civil Courts.

Where the Vadagalais sued for a declaration of their right to recite certain sacred texts in a temple either after or apart from the Tengalais either under usage or under a Razinama which was only a temporary arrangement and asked for damages which were purely imaginary in respect of perquisites which they alleged they had been prevented from getting, *Held*, the suit was not cognizable by the Civil Courts.

*Subbaraya Mudaliar v. Vedantachariar* ... .. 171

- 2. S. 13. Expl. II.**—*Judgment setting aside auction sale to mortgagee as fraudulent*—*Suit by mortgagee on hypothecation, maintainability of*—*Merger of mortgage.*

Where a mortgagee purchases the equity of redemption and the sale is set aside as fraudulent there is no merger of the mortgage and the mortgagee is entitled to fall back upon his mortgage.

A judgment in a suit for setting aside an auction sale to the mortgagee as fraudulent and for recovery of possession from the mortgagee purchaser will not bar the latter from suing to recover the amount due under his hypothecation (which does not entitle the mortgagee to hold possession).

The matter relating to the hypothecation is not a matter which might or ought to have been made a ground of attack within the meaning of S. 13, Expl II, C. P. C.

*Gurusami Aiyar v. Kaveri Boyee Ammal* .. ... 485

- 3. S. 13. Expl. II.**—*Res-judicata*—*Defendant having no interest*—*No decree against such person*—*Finding no res-judicata.*

Where a person who is not interested in the subject-matter of a suit is made a defendant, a judgment in that suit cannot be used as *res-judicata* in a subsequent suit between the said person and the plaintiff in that suit.

Where as a matter of fact the decree in the former suit (brought against three brothers) directed delivery of possession in the hands of two brothers, though upon the ground that there was no partition between the brothers the decree is not against the other brother, who could not, therefore, have appealed against such a decree. *Rajah Ram Bahadoor Singh v. Mussumut Lachoo Koer*, L. R., 12 I. A. 23 at p. 34 followed.

The finding in such suit that there was no partition is not *res-judicata* in a subsequent suit brought by the other brother for a declaration that the properties in his possession and not included in the former suit are his exclusive properties having fallen to him as his share in a partition.

Explanation II to S. 13, C. P. C., can have application only when the matter urged in the subsequent suit could have formed a defence to the first suit.

*Govindasami Thevar v. Gopalasami Sivaji Mohithai* ... 281

4 ————— **S. 13.—Explanation 5.—Res-judicata—Person impleaded as defendant, not interested in relief—Decision not binding.**

Where a person who is a defendant in a suit is not interested in the relief prayed for in that suit a decision passed in such suit does not bind him in a subsequent suit.

Under S. 13, Explanation 5, C. P. C., the plaintiff in the first suit can represent the plaintiff in the second suit only if the latter has any right to any relief claimed in the first suit.

*Chandu v. Kunhamed*, L. R., 14 M. 324 overruled, *Mahabala Bhatta v. Kunhanna Bhatta*, I. L. R., 21 M. 373 (383) approved.

Where, therefore, four out of five reversioners brought a suit against the defendant in possession for recovery of their shares in the estate of the last male owner impleading as a defendant the fifth reversioner who refuses to join in the suit and obtained a decree, a decision in such suit cannot be pleaded as *res judicata* in a suit brought by the fifth reversioner or his representative.

*Somasundara Mudali v. Kulandaivelu Pillai* ... 484

5 ————— **S. 17.—“Reside,” meaning of—Power of Attorney given by Zemindar during absence for Delhi Durbar—Zemindar non-resident—Suit filed by agent, propriety of Vakil’s authority.**

“Reside” is an ambiguous and elastic expression and has to be interpreted with reference to the object and character of the provision in which it occurs.

The object or purpose of S. 37, C. P. C., being to provide for appearances being made and acts being done on behalf of suitors in courts within the jurisdiction of which they are not, at the time, present, a

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liberal construction should be placed upon the term "non-resident" occurring in the said section.

Where, therefore, the plaintiff, the Zemindar of Ettiapuram, left Ettiapuram, his permanent residence, for Delhi to attend the Durbar, and before leaving, gave a power of attorney to a certain person to institute and conduct suits in his absence, and the agent instituted a suit against the defendants for rent due, but omitted to file with the plaint the power of attorney which he was bound to do under Rule 23 of the High Court Rules, and District Munsif returned the plaint for the power of attorney being filed in accordance with the said rule and the plaint was represented with the power of attorney, but after the Zemindar had returned from the Durbar, (the Zemindar being absent in all for about two months):—

- Held* (1) that the Zemindar must be treated as "non-resident within the meaning of S. 37, C. P. C. ;
- (2) that the plaint must be treated as properly presented by the agent within the meaning of that section ;
- (3) that the production of the power of attorney though after the Zemindar's return would not alter the presentation of the plaint when he was away ; and
- (5) that the vakil who had been retained when the plaint was presented was perfectly competent to file the power when he did it.

*Zemindar of Ettiapuram v. Subba Reddy* ... .. 223

6. ————— **Ss. 159 and 386** :—*See* LETTERS PATENT (1).

7. ————— **Ss. 197, Cl. (a), 622** :—*See* CRIMINAL PROCEDURE CODE (3).

8. ————— **S. 232**.—*Right of transferee decree holder—No application merely for recognising transfer—Application for execution.*

A transferee decree-holder can only apply to execute the decree under S. 232, C. P. C. He can make no application merely for recognizing him as transferee and there is no provision of law requiring the court to recognize the validity of the transfer before the transferee applies for execution.

*Ramachendra Aiyar v. Subramania Chettiar* ... .. 393

9. ————— **S. 244**.—*Objection that property belongs to Tavashi—Question in execution.*

An objection by a defendant that immoveable property attached in execution of a decree is not the private property of the judgment-debtor but that of the tavashi consisting of the defendant, the

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judgment-debtor and others is one falling within S. 244, C.P.C., and an appeal will lie from the order of the Court of First Instance.

*Ramaswami Sastrulu v. Kameswaramma*, I. L. B., 23 M. 361, followed.

*Rangan Patter v. Lakshmi Neithiar* ... .. 137

10. ————— **S. 244.**—*Order in execution—Illegal acts done in executing order—Question in execution—Breaking open almyrah—Jewels taken but not mentioned in attachment-list.*

A claim by a judgment-debtor that the decree-holder in executing his decree by attachment of the former's moveable property caused certain almirahs to be broken and took away jewels without mentioning the same in the attachment list and without crediting the same for the decretal amount is one falling under S. 244, Civil Procedure Code, and must be determined only by the court executing the decree.

*Krishnamurthi Aiyar v. Narayanasawmy Aiyar* ... .. 295

11. ————— **S. 244.**—*Partition decree—Application for appointing Commissioner—Limitation—Limitation Act, Art. 178—Order rejecting on ground of limitation—Appeal.*

Where a compromise decree is passed for partition and one of the parties applies for the appointment of a commissioner, an order rejecting the application on the ground that it is barred by limitation is a decree and is, therefore, appealable under S. 244, C. P. C. Such appeal is not taken away by the fact that the court rejecting the application wrongly assumed the existence of a decree to be executed.

An application for the appointment of a commissioner is not governed by Art. 178 of the Limitation Act and is not subject to any rules of limitation.

A court in order to bring the litigation to an end may appoint a commissioner without being put in motion by any party.

*Lachmanan Chetty v. Ramanathan Chetty* ... .. 436

12. ————— **S. 244.**—*Surety of judgment-debtor—Suit for exemption from liability—Maintainability of.*

A suit by a person who has become a surety on behalf of a defendant during the pendency of a suit for a declaration that he is not liable to the decree-holder for a portion of the decree is not maintainable and is barred by S. 244, C. P. C.

*Linga Reddy v. Hussain Reddy* ... .. 43

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13. ————— **S 244**—*Decree-holder purchaser—Purchaser from decree-holder—"Representative"—Maintainability of suit for possession.*

A purchaser from a decree-holder who has purchased property of the judgment-debtor at court auction is a representative of the "decree-holder" for the purposes of S. 244, C. P. C.

Proceedings for delivery of possession between a decree holder purchaser and the judgment-debtor are proceedings "relating to the execution, discharge or satisfaction of the decree."

A suit against a judgment-debtor by the purchaser from a decree-holder for delivery of possession of land purchased by the latter in Court auction and sold to the purchaser is barred by S 244, C. P. C.

*Tharagunar v. Hussain Sahib* ... .. 474

14. ————— **Ss. 244, 287 and 288**—*Proceedings under S. 287—Ministerial not judicial—No order—No appeal under S. 244.*

Proceedings of a Court under S. 287, Civil Procedure Code, and the rules framed thereunder in relation to the proclamation of sale are not 'orders' and are, therefore, not appealable as 'decree.'

The provision in S. 287, Civil Procedure Code, as to summoning witnesses and making enquiries, and the provision in S. 288, Civil Procedure Code, as to exemption of Judges are confirmatory of this view.

*Sivagami Achi v. Subramania Aiyar* ... .. 57

15. ————— **S. 257 A**—*Sanction of Court—Absence of sanction, effect of—Alteration of decree—Entry of ratification—Limitation—Res judicata—Attachment—Effect of dismissal of execution petition on attachment—Order upon a preliminary issue, effect of.*

A decree of Court cannot be subsequently altered except under Ss. 206 or 210.

An agreement between the decree-holder and the judgment-debtor securing some additional benefit to the former does not become a part of the decree by sanction of Court, but can only be enforced in a separate suit.

Without sanction of court, such agreement is void and cannot be enforced either in execution or in a separate suit. To hold that the section does not make it void for a separate suit is to defeat the very policy of the section which is intended to protect judgment-debtors from being coerced by threat of execution proceedings to submit to unconscionable extortion by the decree-holders and is also opposed to the clear terms of the section.

A sanctioned agreement to give time for the payment of the judgment debt operates as a stay of execution under S. 244.

An agreement which adjusts the decree is enforceable in a separate suit, even though sanction has not been obtained, if it does not secure the payment of any sum more than the amount payable under the decree.

If the sanctioned agreement makes any sums payable towards the decree in any particular manner, and payments are so made, such payment should be certified to the court under S. 258; otherwise such payments will not be recognised in subsequent execution proceedings. The judgment-debtor can only sue for breach of contract if such payments were not given credit for.

An application for sanction under S. 257 A is not a step in aid of execution and cannot furnish a fresh starting point of limitation for execution.

Where after execution was barred, applications for execution had been put in and granted after notice to the parties, and even money of the judgment-debtor in court had been paid to the decree holder, held that the Judgment-debtor was debarred from raising the question of limitation.

An attachment made after notice to the Judgment-debtor is not discharged by the mere fact of the application for execution being subsequently dismissed for default of prosecution.

A determination of one of the questions of law which may have to be decided before execution can be granted, is not an order in execution and cannot operate as *res judicata* unless it has been followed up by an order in execution. Nor need such a determination in the absence of an order following it be appealed against.

Where an execution petition is withdrawn after the determination of one of the preliminary questions arising in the case such determination is no more than the expression of the Judge's opinion and is of no effect for any purpose.

*Venkatagiri Aiyar v. Sadagopachariar* ... .. 359

**16. ————— Ss. 363 and 372.—Death of defendant (respondent)—Right to sue not surviving—Against defendant alone—Application to substitute legal representative—Limitation—Delay—Abatement.**

Under S. 368, Civil Procedure Code, which is made applicable to appeals if any defendant (respondent) dies before decree and the right to sue does not survive against the surviving defendants (respondents) alone the plaintiff (appellant) should apply to have a specified person whom he alleges to be the legal representative of the deceased substituted for him, but if he fails so to apply within

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the prescribed period (i. e., 6 months from the death of the deceased) the suit shall abate unless he satisfies the court that he has sufficient cause for not making the application within such period. Where, therefore, pending an appeal against a decree directing that a sum should be paid to a partner in a suit for taking accounts and winding up a partnership, the respondent to whom money was ordered to be paid died leaving a will, probate of which was granted to his son within the 6 months allowed by law for an application to bring in the legal representative as a party and the appellant only made his application after 6 months from the date of the deceased respondent:—

*Held* (1) The right to sue did not survive against the other defendants (respondents) alone and the appeal could not proceed in the absence of the representative of the deceased respondent.

(2) The appellant had not 6 months from the date the legal representative of the deceased respondent was constituted, but only 6 months from the date of the death of the deceased respondent;

(3) As the appellant did not show sufficient cause for not filing the application within proper time the appeal abated.

*Raj Chunder Sen v. Gangadas* ... .. 147

**17. —————** **FS. 373, 462 and 622.**—*Duty of Court with regard to minor—Suit by next friend of minor relating to latter's estate—Infant, position of—Conduct of guardian prejudicial to minor—Duty of Court—Unconditional withdrawal in pursuance of agreement—Agreement within S. 462 voidable—Revision.*

A suit relating to the estate or person of an infant and for his benefit has the effect of making him a Ward of Court and, therefore, no act can be done affecting the property of the minor unless under the express or the implied direction of the Court itself. *Rahimbhoy v. Habibbhoy*, I. L. R., 13 B. 137 referred to and approved.

It is the duty of the Court where it finds that the next friend does not do his duty in relation to the suit not to permit him to prejudice the interests of the minor but to adjourn the suit in order that some one interested in the minor may apply on the minor's behalf for the removal of the next friend and appointment of a new one or in order that the minor plaintiff himself may, on coming of age, elect to proceed with the suit or withdraw from it.

A withdrawal of a suit by the next friend of the minor in pursuance of an agreement or compromise entered into with the defendant without the leave of the Court is voidable at the instance of the minor under S. 462, C. P. C.

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An unconditional withdrawal of a suit by the next friend of a minor (without liberty to bring a fresh suit) is an act prejudicial to the minor and ought not to be allowed by a Court, and if so allowed, the High Court will interfere in revision under S. 622, C. P. C., and set it aside. *Ram Sarup Lal v. Shah Latapat Hosseine*, 1. L. R., 29 C. 735 followed.

*Dorassamy Pillai v. Thungasami Pillai* ... .. 159

18. ————— **Ss. 525 and 622.**—Refusing to file an award—Decree—Appeal—No revision.

An order of a District Munsif refusing to file an award under S. 525, C. P. C., is a decree from which an appeal lies. *Dictum* of the Privy Council in *Ghulam Jilani v. Muhammed Hasan*, L. R. 29 I. A. 51 followed. *Mana Vikrama v. Krishnan Nambudri*, 1. L. R., 3 M. 68, overruled.

*Ponnusami Mudali v. Sundara Mudali* ... .. 25

19. —————, **S. 540**—Common ground—*Locus standi* for appellant :—See HINDU LAW (3).

20. —————, **Ss. 532, 537, 590**—"Procedure"—"Powers"—Distinction between—Interim injunction—Jurisdiction of appellate Court to grant in appeal against order.

*Per Chief Justice and Subrahmania Aiyar, J. (Davies, J., diss.)* :—

An appellate Court has jurisdiction under the Code to pass an interim order of injunction pending an appeal against the order of the Lower Court refusing to grant a temporary injunction pending disposal of a suit for recovery of properties. The fact of the appeal not being against a decree does not prevent the Appellate Court from exercising jurisdiction in the matter.

*Per Chief Justice* :—It would be anomalous to hold that the High Court in second appeal possesses powers which it does not possess in an appeal from an original order and the want of uniformity in the language of Ss. 560 and 587, C. P. C., is no good reason for so holding.

*Semble* :—Even apart from the provisions of the Code, an Appellate Court has inherent jurisdiction to grant such an interim injunction.

*Per Davies J.*—The term "procedure" in S. 590, C. P. C., is not intended to cover all the provisions of ch. XLI of the Code and the term "powers" in S. 582 is pre-eminently not a point of "procedure" as used in S. 590

*Mahadeva Row v. Sethuram Sahib* ... .. 471

21. —————, **S. 623**—Review—Notice—Appeal set down for hearing—Appellant not present—Default.

Under the Code of Civil Procedure no order of review can be made without previous notice to the person in possession of the decree which is to be reviewed.



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It is the duty of a person who has a case in the paper (Notice-board or cause list) to be present prepared to support it by counsel or in person.

*Zahur-ud-din v. Nur-ud-din* ... .. 7

**22. ————— Es 629 and 622—Review of decree after appeal—Order granting review illegal—Remedy either in appeal or revision.—Jurisdiction.**

Lower Courts have no right to interfere on review with decrees passed by them after an appeal has been preferred to an appellate court from such decrees.

An order granting the review of a decree from which an appeal is pending (although such appeal is preferred after the review) is *ultra vires* and can be set aside by the High Court in an appeal from the order granting the review or in revision under S. 622, C. P. C.

An objection to the jurisdiction of the judge in granting the review may be taken in an appeal under S. 629, C. P. C., from the order granting the review although such objection is not mentioned in the section as one of the grounds upon which an appeal against the order granting the review may be allowed.

*Ramanadham Chetti v. Narayanan Chetti* ... .. 321

**Civil Suit:—See CIVIL PROCEDURE CODE (1).**

**Claim of agent for reimbursement:—See CONTRACT ACT (1).**

**Commission, application for appointing:—See CIVIL PROCEDURE CODE (11).**

**Commission, issue of, cases of:—See LETTERS PATENT (1).**

**Companies Act. Es 336 156 and 163.—Notice to creditors to prove claim—Failure to come within time—Penalty—Distribution already made not disturbed—No necessity to file suit—Proof at later stage.**

Where a Company is wound up and an official liquidator appointed a creditor of the Company who fails to bring forward his claim within the time mentioned in the notice published under S. 156 of the Indian Companies Act is not precluded from coming in at a later stage to prove his claim and is not bound to establish his claim by bringing a suit with the special leave of the Court under S. 181 of the said Act.

The penalty for his failure is that mentioned in the latter part of S. 156 under which the claimant will be excluded from the benefit of any distribution made before such debts are proved. He can therefore, only claim a proportionate share in such assets as may

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remain undistributed at the time when he proves his claim and without disturbing any distribution made before such proof.

*In re General Rolling Stock Co.,—Joint Stock Discount Company's Claim*  
L. R., 7 Ch. 646 followed.

Notice of appeal under S. 16<sup>1</sup> may be extended.

*Isack Jesudasen Pillai v. Ramasamy Chetty* ... 345

**Compensation for building:—***See* LANDLORD AND TENANT (2).

**Compromise by guardian, effect of, on minor:—***See* GUARDIAN AND MINOR.

**Conditional undertaking 'o promise:—***See* ACT I of 1897.

**Consideration, failure of:—***See* SPECIFIC PERFORMANCE.

**Contempt of Court:—***See* HINDU LAW. (12)

**Contributory negligence:—***See* TORT.

**1. Contract Act, §. 30.—***Wagering contract—Agreement to pay differences—Payment by agent to third parties—Claim of agent for reimbursement.*

S. 30 of the Contract Act is no bar to a claim for reimbursement by an agent entering into wagering agreements under his principal's authority for payment of differences (in the price of paddy) and paying moneys on behalf of his principal in pursuance of such contracts

*Chekka Venkataswamy v. Gajjala Nagabhushanam...* ... 326

**2. ———, §. 65:—***See* LIMITATION ACT, (4).

**3. ———, §. 108, Excep. I, 178 & 179.—***Bailor and bailee—Possession of bailee—Meaning of "possession"—Bailee pawning goods bailed—Rights of bailor.*

Where a person took some jewels from the owner to be returned to the latter after four days, and after the expiry of the four days the bailee pledged the goods to a third person, the latter is not protected by Ss. 178 and 179 of the Contract Act and the owner may recover the jewels from the pledgee.

*Per Boddam, J.—*

The protection given to pledgees by Contract Act, S. 178, is the same as that given to buyers under S. 108, Excep. I of the same Act.

The word "Possession" has the same meaning in both sections. It is neither custody, nor mere physical control.

*Buddameyye v. Sitaram*, I. L. R., 4 C. 407 and *Shankar Murlidhar v. Mohanlal*, I. L. R., 11 B. 704, referred to.

Jewels in the custody of a wife are not in the "possession" of the wife within the meaning of S. 108, Excep. I and S. 178.

**Contract Act—Continued.**

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"Possession" of a person having a limited interest is not "possession" within the meaning of S. 178, as that case is specially provided for in S. 179.

The "possession" of a person under a hire purchase agreement is not such a possession as is mentioned in S. 179 even in the absence of the words "notwithstanding instructions of the owner to the contrary."

The word "possession" in S. 180, Excep. I does not include the case of a person in possession under a contract of hire.

Per *Subrahmaniam Aiyar, J.*—

S. 179 of the Contract Act refers to cases where the pawner has possession which is necessarily traceable to and is an incident of the limited interest he has in the goods pledged. But S. 178 of the Act refers to cases where the pawner has a document of title to goods or has possession of goods unconnected with and independent of any interest of his in such goods. In the latter case the pawner can, as one invested with the *symbol* or *indicia* of property, make a valid transfer of the goods under certain circumstances notwithstanding the absence of any interest in the goods.

The possession by a pawner when such possession is traceable to and is an incident of his right as the hirer of the goods pawned is not such a possession as is contemplated under S. 178 of the Contract Act.

The possession of goods by a factor is not an incident of his interest in the goods, but is directly attributable to his character as agent whether the agency is one coupled with interest or otherwise.

S. 179 of the Contract Act necessarily implies that the limited interest contemplated therein is such as to make pledge valid to some extent and not altogether invalid.

A pledge by a person who hired the goods after the termination of the bailment is a conversion for which the owner may maintain an action against the hirer and the pledgee.

*Naganada Davay v. Bappu Chettiar* ... .. 89

**4. ————— S. 130—Surety to an administration bond—Right to be discharged from future liability—Right to sue for administration.**

A person who stands as surety to an administration under S. 78 of the Probate and Administration Act is not entitled to be discharged from his liability as regards future transactions upon the ground that the administrator is wasting and mismanaging the estate.

The English practice is also that the original sureties to an administration bond will not be discharged and other sureties allowed to be substituted in their place by the Court.

**Contract Act.—Continued.**

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S. 130 of the Contract Act does not apply to the special contract of suretyship entered into by a surety to an administration bond.

A surety to an administration bond is neither a creditor of the estate nor a legatee and is not entitled to bring an administration suit.

*Subraya Chetty v. Rajammal* ... .. 482

**Contract:—Penalty—High rate of interest.**

Where under the terms of a bond executed to the stake-holders of a certain chitfund the obligor bound himself to pay 27 cottas of paddy in certain instalment and that on default to pay. 1/16th cotta per cotta per diem for interest from date of default.

*Held* that the stipulation was not unenforceable.

*Periasami Thalavar v. Subramanian Asari* ... .. 136

**Contract of sale of goods in India.—Parol evidence—Bought and sold notes—Fraudulent intention in such notes—Trick practised vendor—Right to claim damages—Evidence Act, S. 92—Appellate Court seized of whole case—Substantial justice**

In India a contract of sale of goods can be proved by parol.

Where such contract is completed by bought and sold notes which are however falsified by a trick practised by the vendor on the buyer, the latter will be entitled to disregard them and prove his contract by other and antecedent material.

Where a contract to purchase a cargo of Russian Kerosine oil was entered into by means of telegrams and the transaction was completed by the exchange of bought and sold notes between the broker as representing the vendor and the latter as a fraud or trick practised on the buyer inserted in the bought and sold notes 100,000 cases of oil whereas in reality the cargo amounted to 125,000, cases, and on the vendor refusing to deliver the whole cargo, the purchaser brought a suit for a declaration or for damages that he was entitled to the whole cargo, for rectification of the bought and sold notes and for further relief:—

*Held*, (1) that the right of the buyer being for the whole cargo or for damages upon the contract did not depend either for constitution or evidence on the bought and sold notes and was not affected by the trick practised on him in the said notes.

(2) that the action was not founded on the bought and sold notes and that therefore no rectification was needed.

## Contract of sale of goods in India—Continued.

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- (3) that where the first Court awarded a decree for damages in favor of the aggrieved purchaser but did not mention anything about the prayer for rectification, the appellate court on the appeal of the vendor was possessed of the whole case and was not entitled to say that it was unable to do justice to the buyer on the ground that the first court refused the rectification and that the buyer did not appeal therefrom.
- and (4) that S. 92 of the Evidence Act had no application to the case.

*Durga Prasad v. Bhajan Lal* ... .. 196

## Contract, construction:—See INTEREST ACT.

1. **Court Fees Act E. 7 of 1883**:—*Attachment not binding—Suit to set aside sale is one to set aside attachment—Practice—Procedure—Objection in appeal by defendant appellant that plaint is not properly stamped.*

A suit which is in terms to set aside a sale on the ground that an attachment is not binding is virtually a suit to set aside an attachment and Court-fee should be paid on the amount of the attachment or the value of the land attached whichever is less under S. 7, cl. 8 of the Court-fees Act.

Where a plaint is not properly stamped and a decree is given in plaintiff's favor and objection is taken in appeal, the appellant should be made to pay the proper court-fee before the respondent is called upon to pay the deficient stamp duty payable in the Court of the first instance.

*Gangathara Aiyar v. Veta Chetty* ... .. 144

2. ————— **ss. 7 and 9**:—*Suits Valuation Act, VII of 1887, ss. 8 and 9—Suit for cancellation and delivery of mortgage—Valuation for Court fee—Plaintiff to fix—Power of Court to revise—Jurisdiction.*

A suit for cancellation and delivery up of a mortgage bond falls under S. 7 para IV (c) of the Court Fees Act and the plaintiff is at liberty to value such relief. Such valuation must be verified by the plaintiff and the Court must accept the same and has no jurisdiction to revise it.

The valuation for purposes of jurisdiction is also determined by the value fixed by plaintiff (See S. 8 of Act VII of 1887).

Where, therefore, a plaintiff sued for cancellation and delivery of a mortgage bond for Rs. 4,000 but valued the relief at Rs. 50, such valuation cannot be revised by the Court and the suit is triable by a District Munsif's Court.

No rules are framed by the Madras High Court under S. 9 of the Suits Valuation Act with reference to suits referred to in S. 7, para. iv of the Court Fees Act.

*Chinnammal v. Mahomed Madaras Ravuther* ... .. 242

**Covenant to pay :—**See TRANSFER OF PROPERTY ACT (3).

**1. Criminal Procedure Code, S. 107.**—*Order to keep Mokhasadar—Protest by Mokhasadar—Zamindar's interference with Mokhasadar's possession.*

A Zamindar acts illegally in sending people to a Mokhasa village to oust the Mokhasadar from possession and to induce the tenants to break their engagements with the Mokhasadar and the Mokhasadar is entitled to object to this trespass and to protest against such improper proceedings. Such protests on the part of the Mokhasadar or his agent will not justify a magistrate in binding him to keep the peace.

*Chendrasekhara Dalai v. Emperor* ... .. 491

**2. S. 133.**—*Old market existing—New market opened by another—Carrying on trade not injurious to health or physical comfort—Order closing new market illegal.*

A person who opens a new market close to an old one cannot, by the mere fact of opening such market, be said to be carrying on a trade or occupation that is injurious to the health or physical comfort of the community: and a Magistrate is not justified in passing an order under S. 133 of the Criminal Procedure Code closing the new market.

Even the fact that people in the old market are forcibly dragged from it to the new one will not justify the order under S. 133

*Moidin Kutti v. Abdulla* ... .. 207

**3. 195, Sub. S. 1 Cls. (b) and (c), Es. 6 & 7, Cl. (a) & S. 439.**—*Civil Procedure Code Ss. 197, Cl. (a) 22—Village Courts, Act, 1886—Charter Act, S. 15—Penal Code S. 199—Meaning of Court Subordinate—First Court refusing or according sanction—2nd Court setting aside on appeal—Appeal to High Court—True theory as to order by Court of appeal—Affidavit in attachment before judgment—Liability of declarant under S. 199, Penal Code for false statement—Any Court competent to administer oath of declaration to affidavit—Village Munsif, a Court.*

An order passed by the court of appeal is in law the order which ought to have been passed by the Subordinate Court and will, therefore, have the same efficacy and operation as the order which ought to have been passed by the latter.

petition under S. 195, Criminal Procedure Code, by way of appeal lies against the order of a District Judge granting sanction and passed in an appeal preferred from the order of a Subordinate Judge refusing sanction in respect of offences alleged to be committed before the Court of the Subordinate Judge.

Under Sub-S. (6) of S. 195 Criminal Procedure Code, by way of appeal lies to the High Court in every case in which a Civil or

**Criminal Procedure Code—Continued.**

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Criminal Court subordinate to it within the meaning of Sub S. 7(c) gives or refuses a sanction whether in respect of an offence committed before it or one committed before a Court subordinate to it and, in the latter case, whether it gives a sanction refused by the Subordinate Court or revokes a sanction accorded by such court.

Under Cl. (b) and (c) of Sub-S. 1 of S. 195, sanction may be accorded in the first instance by the Court to which the Court in which the offence is committed is 'subordinate' even though no application for sanction has been made to the latter court.

The High Court, in a case in which both the Original Criminal Court and the Appellate Criminal Court refuse a sanction, may as a Court of Revision, call for the record under S. 439, Criminal Procedure Code, and if the refusal proceeds upon an error of law, the High Court may accord sanction which will be operative for the purposes of clauses (b) and (c) of Sub-S. 1 of S. 195, Criminal Procedure Code.

Where an affidavit in cases in which evidence may be given by affidavit is intended to be used in a judicial proceeding before a Court of Justice and the declarant has made a statement therein that is false to his knowledge touching any point material to the object for which the affidavit is to be used, the declarant will be guilty under S. 199, Penal Code.

A Village Munsif is a Judge of the Court of the Village Munsif established under Madras Village Courts Act, 1888.

Any Court may administer the oath of the declaration to an affidavit under S. 197 Cl. (a), C. P. C. and, therefore, a Village Munsif can sign the declaration to an affidavit intended to be used in support of an application for attachment before judgment.

A statement made in an affidavit in which the declaration is signed by a Village Munsif may render the declarant liable for perjury for which sanction may properly be obtained.

Where sanction had been accorded by the Sub-Judge and confirmed by the District Judge, although the High Court might not interfere under S. 623, Civil Procedure Code, where the Courts below did not act illegally or with material irregularity, yet where the High Court had to consider the subject-matter of the sanction upon the merits in connection with another application by way of appeal under S. 195, Criminal Procedure Code, with respect to the sanction of other offences on the same materials and the High Court held that the sanction accorded was not proper, the High Court might, in exercise of the powers vested in them under S. 15 of the

**Criminal Procedure Code—Continued.**

Charter Act, set aside the sanction for the offences accorded by both Courts. Page.

*Palaniappa Chetti v. Annamalai Chetti* ... 74

**Criminal trial** :—See LETTERS PATENT (2).

**Daughter's estate, nature of** :—See HINDU LAW (4).

**Declaratory decree in favor of reversioner, effect of** :—See SPECIFIC RELIEF ACT (2).

**Declaratory decree, matter of discretion** :—See SPECIFIC RELIEF ACT (2).

**Decree** :—See CIVIL PROCEDURE CODE (18).

—**Competency of party to impeach in execution proceedings.**

—*Jurisdiction objection as to—Want of Evidence.*

A party to the suit is precluded in execution from impeaching the decree which has been passed without opposition and which has not been set aside.

But he may impeach it on the ground that the court passing the decree had absolutely no jurisdiction to pass it and that, therefore the decree was a nullity.

Where a court has jurisdiction to pass a personal decree the passing of such decree without any evidence in support thereof will not make it as one passed without jurisdiction.

*Rangasamy Naicken v. Tirupati Naicken* ... 41

**Decree declaring right of pasturage, effect of** :—See PASTURAGE.

—**in favor of a manager** :—*Decree reversed on appeal—Restitution Personal liability of manager.*

Where the manager of a temple obtains a decree for payment of money and after realizing the same in execution pays the sum so realized to the temple committee, but the original decree is reversed on appeal, restitution cannot be enforced against him by arrest.

The private property of an individual cannot be taken in execution of a decree against him in his capacity as manager or trustee of a temple (except in respect of a liability arising by his breach of trust) just as the property of the temple cannot be taken in execution where the decree against him is in respect of his personal debt.

*Venkatasami Pillai v. Kuppayee Ammal* ... 377

**1. Deed Construction—Covenant by mortgagee to pay Government kist—Enhancement—Liability to pay enhanced kist—Right of suit before redemption.**

A usufructuary mortgagee in possession covenanting to pay the Government kist on the mortgaged land and to appropriate the balance of profits for 'interest on the mortgage amount irres-



**Deed construction—Continued.**

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pective of the actual profits in any particular year is not, in the absence of a contract to the contrary, liable as between himself and the mortgagor to pay enhanced revenue if the enhancement takes place subsequent to his mortgage. The reasonable view is that the revenue payable under the settlement in force is all that the mortgagee undertakes to pay and the ultimate responsibility in respect of any addition to the land Revenue devolves on the mortgagor. *Kamaya v. Devapa* I. L. R., 22 B. 440 and *Hira Lall v. Ganesh Pershad* L. R. 9 I. A. 68 referred to.

*Quere.*—Whether the mortgagor can maintain suit against the mortgagee for the amount of revenue payable by the latter and paid by the mortgagor without offering to redeem.

*Krishnaier v. Arappuli Iyer* ... .. 488

2. ————— *Sale or Mortgage—Lease in possession—Fresh debt from lessee repayable at a fixed date—Lessee to enjoy absolutely on default—No further conveyance—Transfer of Property Act—Right to possession.*

Where a person borrows from his lessee a debt and executes document which provides that in case of non-payment within a given period the lessee should enjoy the property absolutely the transaction is a sale and there is no right to redeem as upon a mortgage.

*Semble* :—A further sale-deed will be necessary under the Transfer of Property Act notwithstanding that the document may dispense with such further sale-deed.

*Quere* :—Whether the plaintiff is entitled to recover possession of the ground of there being no conveyance satisfying the provisions of the Transfer of Property Act when the right to obtain such conveyance has not become barred at the date of the plaintiff's suit.

*Butchiraju v. Ramalingamurthy* ... .. 387

**Default.**—See CIVIL PROCEDURE CODE (31).

**District Municipalities Act, (Madras Act IV of 1884), ss. 53, 262, Sub. (3) and Schedule A.**—"Income," meaning of—*Net income not gross—Jurisdiction of Civil Courts.*

The word "income" occurring in Schedule A of the District Municipalities Act means the "net income" or the profits derived from a business and not the gross income or receipts.

*Lawless v. Sullivan*, L. R. 6 A. C. 373 followed.

Where a proprietor of a printing press is taxed upon his gross income or receipts, the provisions of the Act have not been in substance and effect complied with so as to oust under S. 262, Sub. S. 3 of the Act the power of Civil Courts to question the legality of the assessment.

*Municipal Council of Mangalore v. Cordial Ball Press, Mangalore* ... 410

**Effect of new Statutes, on pending actions and procedure:—**

*See MADRAS ACT II OF 1894.*

**Emfranchisement in favour of widow, effect of:—***See PERSONAL INAM.*

**Estoppel, certainty of Res Judicata:—***See MOHINI ARRANGEMENT BY GOVERNMENT.*

**Estoppel:—***See MADRAS ACT III OF 1895.*

**1. Evidence Act, S. 92:—***See CONTRACT OF SALE OF GOODS.*

**2. —————, proviso 4.—***Usufructuary mortgagee—Discharge by mortgagee of performances—Oral agreement between mortgagee and some representatives of mortgagor—Proof—Rescission of contract.*

An oral agreement by which an usufructuary mortgagee stipulated for the discharge of a portion of the mortgage properties by receiving a proportionate part of the mortgage debt from one of the representatives of the mortgagor can be proved provided such agreement is between the mortgagee and one of the representatives (but not all) of the mortgagor and Evidence Act, S. 92, Proviso 4, concluding part, has no application to such a case.

*Per Boddam, J.:*—The exception at the end of proviso 4 to S. 92 of the Evidence Act applies to executory as well as executed agreements.

No contract can be rescinded or modified except by the consent of all the parties to it or their representatives.

Some of the parties to a written contract may agree orally, that some one or more of the parties thereto may be discharged from it and the proviso to S. 92 with the exception does not apply to such a case and there is no other provision of law preventing proof of such an oral agreement from being given.

*Subbarew v. Venkatanarasimham* ... .. 218

**Evidence Act, Ss. 107, 108:—***See LIMITATION ACT, (7).*

**Execution petition, dismissal of, on attachment:—***See CIVIL PROCEDURE CODE (15).*

**Execution, order in:—***See TRANSFER OF PROPERTY ACT (5).*

**Form natures:—***See PENAL CODE (4).*

**Guardian and Minor.—***Compromise by guardian, validity of.*

Where a guardian enters on behalf of a minor into a compromise of a doubtful right and has acted in the interests of the minor under the circumstances, such compromise is binding on the minor and the latter cannot seek to set aside the compromise on the ground that the state of things assumed by the compromise was otherwise.

*Sulla Reddi v. Kotamma...* ... .. 442

**Hindu and Mahomedan Laws on compensation for building between Landlord and Tenant:—See LANDLORD AND TENANT,(2)**

**1. Hindu Law.—Adoption—Agreement between natural father of adopted son and adopted—Test of validity.**

The natural father of the boy to be given in adoption is not legally incapable of acting as guardian for such boy and of making an agreement on the latter's behalf with regard to the property to be acquired by the adoption.

The validity of an agreement with regard to such property entered into by the natural father on behalf of the son to be given in adoption will depend upon the fact of the agreement being fair and reasonable and for the minor's benefit.

Where a widow took a boy in adoption on the express stipulation made with the natural father at the time of the adoption that in the event of disagreement between her adopted son a moiety of husband's properties was to remain in her possession for her life and that the adopted son should only take it after her death,

*Held*, that the agreement being fair and reasonable was valid and binding on the adopted son.

*Visalakshiammal v. Sivaraman* ... .. 310

**2. ———, Decree against father—Joint family consisting of father and sons—Father dying before execution—Sons not necessary to be joined—No notice necessary.**

Where the judgment-debtor dies before execution and the decree-holder executes the decree as against his minor sons (already parties to the suit) as legal representatives after a guardian *ad litem* for the latter is appointed by an order of court which is passed without obtaining the guardian's previous consent and properties are sold in execution, the action of the court in making such order is merely irregular and does not vitiate the sale especially where no objection is taken on that score in the courts below and the same guardian applies on the minor's behalf to set aside the sale.

Where a joint family consists of the father and his sons and a mortgage decree is obtained against them, it is neither necessary to join the sons as legal representatives of the deceased father on his death nor to give them notice of the order absolute.

*Oodayanasamy Thevar v. Alagappa Chetty* ... .. 342

**3. ——— Co-widows—Mortgage by senior widow—Necessity—Valid as against junior widow and reversioners—Son of next reversioner made defendant—Costs—Common ground—Locus standi of appellant—Civil Procedure Code, S. 540.**

Where in a suit upon a mortgage by one of two widows, the next reversioner and his son are brought in as claiming under a settle-

ment executed by the other widow and a decree is obtained, the son of the next reversioner who is so impleaded as defendant has a *locus standi* to maintain an appeal and to appeal against the whole decree under S. 540, C. P. C.

In the case of mortgage or other alienation made by the senior widow, the onus is upon the alienee to show that the consideration was in fact paid and that the loan was raised or the alienation made for a purpose binding on the junior widow and the reversionary heirs; and the fact that the executant of the deed by her return statement fully supports the plaintiff's case in no way affects the onus.

Costs incurred by a widow in respect of a claim which is not *bonafide* and which the widow does not believe to be *bonafide* are not a legitimate charge on the husband's estate and will not constitute a necessity to justify alienation, but costs incurred by the widow in defending the husband's estate in a suit brought by third parties against her as the heir of her husband will be necessity sufficient to justify an alienation.

A mortgage executed by the senior widow for a necessary purpose without the concurrence of the junior widow will be binding upon the latter and the reversioner. *Sri Gajapati Radhamani v. Maharani Sri Pasupati Alakajewari*, I. L. R., 16 M. 1 distinguished.

*Kaliyanasundaram Pillai v. Subba Mooppanar* ... 139

4 ————— *Daughter's estate—Partition among daughters—Renunciation of right of survivorship—Question of intention—Partition under belief, estate was absolute—No renunciation—Option to purchase.*

A daughter has only a limited and qualified estate in her father's estate.

Ordinarily daughters who partition their father's estate have the right of survivorship in the sense that those who survive the others will take the share of the deceased in preference to those who take the deceased's *stridhanam*.

It is, however, open to such daughters while effecting a partition by apt language to renounce this right of survivorship.

It is a question of intention in each case to be gathered from the deed of partition, if any, and the surrounding circumstances whether the daughters retained or renounced their right of survivorship.

Where a partition was entered into under the belief that the daughters were absolutely entitled to their father's estate (which belief was founded upon the then state of the law in the Madras Presidency) and under the partition deed it was provided that if one daughter should find it necessary to sell her share, the other daughters should be given the option of purchasing the same, but that if they

**Hindu Law—Continued.**

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should not be disposed to purchase the same it might be sold to strangers and that from the date of partition the parties should only be connected by blood. :—

*Held* (1) that there was no renunciation of the right of survivorship which was not within the contemplation of the parties;

and (2) that the provision to sell the property to a stranger in case the other daughters should not be disposed to purchase the same should not be construed as referring only to a transfer with the consent of all and for purposes which would render a transfer by qualified owners binding upon the reversioner.

*Gomathi Ammal v. Kupputhayi Ammal* ... .. 175

**5. ——— Father's debt—Son's liability—Mortgage—Pious obligation of son—Mortgage binding qua mortgage.**

A debt incurred by the father is not illegal or immoral, is binding upon his son's interest in the family property even during the lifetime of the father and any alienation voluntary or involuntary made to discharge that debt is binding upon the son.

A mortgage given for a debt then incurred is binding upon the son as such if it is not illegal or immoral and a suit for sale including the to probabalise the son's share will lie.

*Sami Ayyangar v. Ponnammal*, 1, L. R., 21 M. 28 dissented from.

*Ohidambara Mudaliar v. Koothaperumal* ... .. 181

**6. ——— Joint Family—Partition—Cesser of commensality—Circumstances showing separations.**

Cesser of commensality is an element which may properly be considered in determining the question whether there has been a partition of joint family property, but it is not conclusive. *Mussumat Amundee Koonwar v. Khedo Lal*, 14 M. 1. A., 412.

Separate payment of revenue, separate receipts for rent, adjustment of moneys realized under a decree, purchase of an estate by the members in equal shares, and the fact that one of the members sued as the heir of co-deceased member are circumstances which tend to probabalise the theory of separation.

According to the Mitakshara law in force in Bengal a mother, though not entitled to require a partition so long as her sons remain united, is entitled, if a partition takes place between her sons, to receive the share of a son in property which is ancestral or acquired by the employment of ancestral wealth.

But if she acquiesces in the division of the property between her sons without claiming any share for herself, a partition made without allotting a share for her is valid and binding upon her.

Where a partition made without awarding a share to the mother and all the parties are before Court, the Court may declare the partition not binding on her and may award her a share.

*Krishnabai v. Khangoonda*, I. L. R., 18 B. 197 approved.

There is nothing irregular under S. 44, cl. (a) C. P. O., in seeking to recover in one suit moveable and immoveable property if the cause of action is the same in respect of both, and the limitation in both cases is the same. *Giyana Sambandha Pandara v. Kandasamy Tambiran*, I. L. R., 10 M. 375 approved.

A claim by a widow for partition of moveable and immoveable properties in right of her deceased husband upon refusal by the latter's brother is based upon a single cause of action and can be litigated in a single suit.

*Ganesh Dutt v. Jewach* ... .. 8

7. ———— *Judgment against father—Son's obligation—Maintainability of suit—Son may show debt not existent.*

A suit by a creditor against the son of the debtor to enforce the son's duty to pay the debt created by the judgment against his father is maintainable.

The son may show notwithstanding such judgment that the debt is not existent.

*Thiruvankata Mudaliar v. Muthu Aiyar* ... .. 481

8. ———— *Judgment-debt—Debt created by judgment—Not same as debt arising from original transaction.*

A judgment obtained against the father creates a debt against the latter by its own force and independently of the debt arising from the original transaction and there is a pious obligation on the part of the son to discharge such judgment-debt unless it is illegal or immoral.

A suit by the creditor to enforce as against the son the debt created by a judgment obtained against the father is not "a suit upon a judgment" and is governed by Art. 120 and not Art. 122 of the Limitation Act.

Per *Bhashyam Aiyangar J.*:—A son is not personally liable for debts incurred by the father. His interest, however, in the joint family property is liable for the same during the father's life-time. But if the father should die before attachment, the son cannot be proceeded against in execution with reference to the joint family property though it will be otherwise with reference to the father's self-acquisition. The joint family property cannot also be proceeded against in execution in a case where the suit is brought against the

**Hindu Law—Continued.**

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father who dies pending the same and continued against the son as the father's legal representative.

During the life-time of the father, the creditor cannot bring a suit against the son only for a debt due by the father but the son may be joined as a party defendant in a suit brought against the father. The son cannot contend in execution that the father's debt is illegal or immoral.

*Periasami Mudaliar v. Seetharama Chettiar* ... .. 84

9. ———— *Maintenance given under instrument—Change of circumstance—Right to claim enhancement—Release of right—Question of construction.*  
Where maintenance is awarded under a particular instrument and there were no words of release of the right to claim increased maintenance under a change of circumstances ;—

*Held*—there was no release of such a right.

It is a question of construction of the instrument whether such right is as a fact released. The mere fact that the maintenance is expressed to be paid for life does not show such a release.

*Nagamma v. Virabhadra*, I. L. R., 17 M. 392 referred to.

*Subramanian Patter v. Vembammal* ... .. 339

10. ———— *Reversioners' suits—No privity between reversioners—Remote reversioners when entitled to sue—Limitation Act, S. 7, and Arts. 120, 125—Suit to set aside alienation—Specific Relief Act, S. 42—Discretion—Parties—Statute—Construction.*

A suit by a person who is not the presumptive reversioner at the time for setting aside an alienation made by the widow is governed by Art. 120 and not by Art. 125.

*Bhagwanta v. Sukhi*, I. L. R., 22 A. 33, followed ; *Chhaganram Astikram v. Bai Moti Gavri*, I. L. R., 14 B. 512, dissented from ; and *Ayyadorai Pillai v. Solai Ammal*, I. L. R., 24 M. 405, distinguished.

There is no privity of estate between one reversioner and another as such and, therefore, an act or omission by one reversioner cannot bind another who does not claim through him.

Where there are several reversioners entitled successively to succeed to an estate held for life by a Hindu widow, no one of such reversioners can be held to claim through, or to derive his title from, another reversioner even if that other happens to be his father, but each derives his title from the last full owner and the right of each to sue for a declaration cannot accrue before he is born.

A reversioner who is a minor at the date of the alienation or who is born subsequently during the life of the widow is entitled to the benefit of S. 7 of the Limitation Act.

*Bhagwanta v. Sukhi*, I. L. R., 22 A. 33, followed.

Remote reversioners have a right of suit where all the reversioners of the superior grade have either colluded with the widow or have otherwise precluded themselves from bringing a suit or are barred by the Law of Limitation from bringing such a suit. In such a case upon a plaint stating the circumstances under which the more distant reversioner claims to sue, the court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue and would probably require the nearer reversioner to be made a party to the suit.

*Rani Anund Koor v. The Court of Wards*, L. R., 8 I. A. 14 and *Gurulingaswami v. Ramalakshmanamma*, I. L. R., 18 M. 53, followed.

*Semle* :—A Court of First Instance ought in the exercise of the discretion vested in it by Specific Relief Act S. 43 refuse to give a declaration in favor of plaintiff who has a very remote chance of succession. *Tekait Doorga Pershad v. Tekaitni Doorga Konwari*, I. R., 5 I. A. 142 (153), referred to.

But where two courts have given a declaratory decree in favour of a remote reversioner the High Court will not interfere though it is of opinion that as a first court it would not have granted the relief.

It would be wrong on principle to hold that the words of a section in an Act must be limited to the illustrations given in the Act, or by reference to suits specially enumerated in the Limitation Act.

PER DAVIES, J. :—A decree granting a declaration in favour of a remote reversioner will serve the purpose of perpetuating testimony for whomsoever may happen to be the reversioner on the death of the widow.

*Govinda Pillai v. Thayammal* ... 200

11. ————— *Reversioner's suit*:—See SPECIFIC RELIEF ACT (2).
12. ————— *Succession—Right of murderer to succeed as heir of the person murdered—Exclusion—Justice, equity and good conscience—“Nemo ex suo delicto meliorem suam conditionem facere potest”—Specific Relief Act, S. 43—Suit for declaration—Contempt of Court.*

The sin attaching to the commission of serious crimes such as robbery, murder, &c., does not entail of itself forfeiture of civil rights under the Hindu Law.

The text of Yajñawalkya providing for inheritance to the separate property of a person (vs. 135, 136) is subject to the rules as to disqualification contained in later texts.

The text purporting to exclude from the succession a son “hostile to the father” must be regarded as obsolete.



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Although there is nothing in any express text of Hindu Law disqualifying a murderer or other person privy to the murder from succeeding to the person who was the victim of murder, the maxim "*Nemo ex suo delicto meliorem suam conditionem facere potest*" according to which the wrongful act (murder) committed by a person standing in the position of heir disentitles him to any beneficial interest in the inheritance is one of universal application and ought to be followed in British India as a rule of justice, equity and good conscience.

A mother murdering her son is not beneficially entitled to take his estate by inheritance.

The fact of her having been acquitted or convicted is not relevant in a civil court upon the question whether she has committed the wrongful act imputed to her and if so, whether by such act she has forfeited her rights of inheritance.

Where a plaintiff who was the next person entitled to succeed after the mother had been appointed in a prior suit as a receiver and an order was passed in such suit directing the plaintiff to hand over the properties to the mother, a suit by the plaintiff for setting aside the order and for declaring that on account of the mother's wrongful act he was entitled to the inheritance of her son was maintainable and was not barred by S. 42 of the Specific Relief Act.

Where the plaintiff who was directed as receiver to hand over possession to the mother subsequently brought a suit and obtained a temporary injunction restraining her (the defendant) from taking possession of her son's properties, he was not guilty of any contempt so as to disentitle him to get a declaration in his favor in such suit.

*Vedanayaga Mudaliar v. Vedammal* ... .. 297

**Inam patta, effect of :—***See SPIRITUAL OFFICE.*

**"Income," meaning of :—***See DISTRICT MUNICIPALITIES ACT.*

**Injunction :—***See RIPARIAN RIGHTS.*

**Interest Act of 1839—***Status of under-proprietor recognised by agreement—Agreement merged in decree—Failure to pay rent—No breach of contract—Terms of subsequent Act not to be imported—Oudh Rent Act XXII of 1886, S. 141—Under proprietor no tenant—Condition, for claiming interest under Interest Act—Written instrument—Money payable on a certain day—Instrument to contain day or basis.*

Where parties enter into a compromise by which the status of one party as under-proprietor is recognised and a certain amount of rent is made payable to the other party and compromise is carried

**Interest Act—Continued.**

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into effect by a decree being passed in accordance therewith, the agreement is merged in the decree and the obligation to pay rent is derived from the status of under-proprietor established by the decree.

Where the rent is not paid a suit for recovery of rent and for interest on arrears is not a suit for breach of contract within the meaning of S. 73 of the Contract Act.

An under-proprietor if not a tenant within the meaning of S. 141 of the Oudh Rent Act of 1886 (XXII of 1886) and will not be liable under section to pay interest on arrears.

*Muhammad Siddiq Khan v. Muhammad Nasir-ul-lah Khan*, L. R., 26 I. A. 45, referred to.

- But the Oudh Rent Act does not exclude any liability for payment of interest which the under-proprietor may be under apart from the Act. S. 12 of the Oudh Rent Act, 1886, provides that, unless otherwise agreed the rent payable to the proprietor by the under-proprietor shall be held to become due one month before the date fixed for the payment of the revenue on account of the village in which the land is situate.

A Court ought not to read into an agreement a section in an Act subsequently passed.

Where a compromise and decree of 1864 did not prescribe any time of payment of rent, the provisions of S. 12 of the Oudh Rent Act could not be imported into them.

The Interest Act of 1839 was passed for the purpose of extending to India the provisions of the English Act 3 & 4 W. IV. C. 42 and the words of two Acts being the same, the English decisions may be referred to as a guide in construing the Indian Act.

Where an agreement though it did not contain any express day for payment of a sum certain did not even contain or refer to any basis by calculating which a certain date for payment might be arrived at no interest could be claimed under the Interest Act.

*Query*:—In order to claim the benefit of the Interest Act, is it necessary that the actual day for payment must be fixed in the written instrument itself: (see *The London Chatham and Dover Railway Company v. The South Eastern Railway Company*, (1892) 1 Ch. 120, *Merchant Shipping Company v. Armitage*) L. R., 9 Q. B. 99, or is it enough if the basis of calculation which is to make the day of payment certain is to be found in the instrument although the actual day of payment is not found in it (see *Duncombe v. The Brighton Club and Norfolk Hotel Company*, L. R., 10 Q. B. 371.

*Thakur Ganesh Baksh v. Thakur Harihar Baksh* ... .. 100

**Immoveable property** :—See MALABAR LAW.

**Joint family** :—See HINDU LAW (2).

**Judgment in a criminal trial** :—See LETTERS PATENT, (2).

**Jurisdiction** :—See COURT FEES ACT, (2).

————— **inherent of courts to prevent abuse of process** :—See LETTERS PATENT, (1).

————— :—See MADRAS ACT III OF 1895.

————— **of appellate Court to grant interim injunction** :—See CIVIL PROCEDURE CODE, (20).

————— **of Civil Courts** :—See CIVIL PROCEDURE CODE (1).

————— :—See DISTRICT MUNICIPALITIES ACT.

————— **of lower Court for granting review after appeal** :—See CIVIL PROCEDURE CODE (22).

————— **objection as to** :—See DECREE COMPETENCY OF PARTY TO IMPRACH IN EXECUTION PROCEEDINGS.

**Karnam's emoluments** :—See MADRAS ACT II OF 1894.

**Karnavanship, status of Karnavan** :—See MALABAR LAW.

**Land Acquisition Act I of 1894, Ss. 17 and 48** :—See LIMITATION ACT (3).

1. **Landlord and Tenant**—Non-payment of rent, effect of—Limitation Act, Art. 181—Suit to establish right to recover rent—Period of Limitation—Temple inam.

Mere non-payment of rent will not bar the landlord's right to recover rent.

Such non-payment may be relevant when the question is whether the land for which rent is claimed belongs to the person who claims to recover the rent.

A suit to establish a person's right to recover rent is governed by Art. 181 of the Limitation Act.

Where a tree-tax was assigned as inam to a temple, the inam will cease where the trees became extinct.

But where the tax on land upon which trees stood and which was in possession of tenants was assigned as inam to a temple, the latter is entitled to the melvaram upon the land.

Jagannatha Pandiajiar v. Muthia Pillai ... .. 477

2. ————— **Tenant erecting buildings not for agricultural purposes**—Tenant's only right to demolish and remove building materials during continuance of lease—Tenant's right after termination—Option of landlord—Transfer of Property Act, Ss. 51 and 108—Law prior to Transfer of Property Act—Hindu and Mahomedan Laws on the subject.

Where under a lease it is provided that the tenant will remove at the end of the term the superstructure he may build upon the land and vacate the site, the tenant cannot claim any compensation from the landlord.

Even before the Transfer of Property Act, it has long been judicially settled that the maxim of the English Law "*Quicquid inædificatur solo solo cedit*" does not generally apply here.

*Thakoor Chander Paramanick*, B. L. R. (F. B.) Supp. Vol. 597, followed.

The law upon this subject prior to the Transfer of Property Act was not the Hindu and Mahomedan Laws as such as under S. 16 of the Madras Civil Courts Act. Those laws were not strictly applicable to cases arising from contract. But Hindu Law was applied in the absence of any special usage as custom as a rule of justice, equity and good conscience.

According to the Hindu Law if a man should build a house on the ground of a stranger and live in it paying for it, he might remove the building materials when he should leave the house and not claim any compensation, but if he should be a trespasser and build on the land without the owner's wish he could not remove the building materials.

According to the Mahomedan Law even a trespasser would be entitled to remove the building materials when he should be directed to restore the land to the owner and he would not be entitled to claim compensation. But if removal be injurious to the land, the owner would have the option of paying compensation equal to the value of the materials of the building if it were demolished.

*Secretary of State for Foreign affairs v. Charlesworth Pilling and Co.*, I. L. R., 26 B. 1 referred to.

The rules laid down by the Transfer of Property Act substantially reproduce the law as it stood before the Act.

Under S. 108 of the Transfer of Property Act the lessee must not, in the absence of a contract of local usage to the contrary, erect without the lessor's consent on the property demised any permanent superstructure except for agricultural purposes and the lessee may remove at any time during the continuance of the lease all things attached to the earth and must restore the land to the lessor on the determination of the lease in the state in which it was at the time of the letting.

Where the tenant has not removed the materials during the continuance of the tenancy, the ordinary or common law of the country is that the lessor has the option either to take the building on

**Landlord and Tenant—Continued.**

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paying compensation or if he is unwilling to pay compensation to allow the tenant to remove the building.

The measure of compensation, if the lessor exercises the option of taking the building is, according to the Mahomedan Law as laid down in the Hedaya, the value of the materials after the building is demolished.

*Obiter* :—Where a person believes in good faith that he had in the property the absolute interest of a permanent lessee and in such faith erected a permanent building on the site he would be entitled to claim compensation if it should be ultimately held that he had no permanent interest and must surrender the land upon the principle recognised in S. 51 of the Transfer of Property Act.

From the fact that the lease expressly permits the tenant to erect permanent building it cannot be implied as one of the terms of the contract of letting that the lessor will not exercise his right of ejectment without paying compensation for the buildings erected by the tenant.

Decision of *Innes, J.*, in *Mahalatchmi Ammal v. Palani Chetti*, 6 M. H. C. R. 245 dissented from.

The only difference between letting land without permission—either express or implied—to erect buildings thereon and letting the same with such permission is that in the former case the lessee cannot under Cl. (p) of s. 108 of the T. P. Act erect any permanent buildings on the land (except for agricultural purposes) and if he does, a suit for a mandatory injunction for the removal of the building even during the term of the lease will lie.

*Ramanadhan v. Zamindar of Ramnad*, 1 L. R., 16 M. 407 referred to.

*Ismai Kani Rowthen v. Nasarali Sahib* ... ..

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**3. ————— Tenant's holding—Relinquishment of portion—Validity.**

Where a tenant relinquishes portions of the dry lands in his holding, such relinquishment is invalid if the portions are not ear-marked and not capable of identification and the tenant pays a consolidated assessment on his holding.

If the portion is a separate holding bearing a separate assessment, then the relinquishment will be valid.

Where a tenant holds dry and garden lands, it is open to him to relinquish the dry land keeping the garden lands when the latter bear a separate assessment.

*Rajah of Venkatagiri v. Musani Chenchu Reddy* ... ..

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**4. ————— Well constructed by tenant—Land irrigated by well—Garden crops raised—Garden rule—Payment—Implied contract—Notice to tenant—Omission to give particulars of date—No material irregularity.**

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The mere fact that garden rates were paid by the tenant for a few years for land irrigated by means of well constructed by himself would not raise any presumption of an implied contract to pay the said rates; though it would be otherwise if the payments had continued for a long period and the transaction should be attended by other circumstances.

Omission to enter the dates on which the kists are due is not a material irregularity so as to vitiate a notice, provided the fasli with respect to which the rent is due has been correctly given in the notice.

*Venkata Narasimha Appa Row v. Nalla Kondayya* ... 145

**Legal Practitioners' Act, ss. 27 and 28.**—*Outfees disbursed by Vakild  
—Pronote by client for such outfees—Pronote not filed in Court—Validity  
of pro-note—Right of Vakild to claim recovery—Lien upon sums received  
from Court.*

A promissory note taken by a Vakild from his client for an amount not advanced by way of loan but disbursed by the Vakild at the request of the client for outfees in the suit in which he is retained as Vakild is within the meaning of S. 28 of the Legal Practitioners' Act an "agreement respecting the amount of payment for charges incurred or disbursements made" by the Vakild in respect of the suit in which he is retained as Vakild and if not filed in court is void under that section.

The section is general and is not restricted in its operation to agreements which provide for the payment of a larger amount than the disbursements actually made for outfees or of a lump sum irrespective of such disbursements or for payment of pleader's fee in excess of what may be allowed under the Rules framed under S. 27 of the Legal Practitioners' Act.

*Basid-din v. Karim Baksh*, I. L. R., 12 A. 169 and *Sarat Chunder Roy Chowdhry v. Chundra Kanta Roy*, I. L. R., 25 C. 805, dissented from.

Although such agreement may be invalid the pleader is not disentitled, in the absence of any agreement, to claim the repayment of outfees advanced by him or reasonable remuneration in respect of his professional services.

*Rama v. Kunji*, I. L. R., 9 M. 375 and *Krishnasami v. Kesava*, I. L. R., 14 M. 63, followed.

The Legal Practitioners' Act does not enact that no claim by a pleader for professional services rendered or for recovery of outfees advanced shall be sustainable unless an agreement in writing for the same has been entered into with the client and filed in court but only that an agreement, if any, entered into in respect of the

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same shall be void and unenforceable unless the same has been reduced to writing and filed in court.

A Vakil who disburses outfees at the request of his client and takes a promote for them which not being filed in court becomes void is entitled to recover such outfees independent of the void promissory note and is entitled under S. 217 of the Contract Act to retain the same out of the sums received by him to the credit of his client in the suit in which he has disbursed the outfees.

*Quære* :—Whether a Vakil will be entitled in the absence of express authority from the client to retain out of monies received by him in one suit fees or outfees due on disbursed by him in another suit.

*Subba Pillai v. Ramasamy Aiyar* ... .. 274

**1. Letters Patent, S. 15—Charter Act—Civil Procedure Code, Ss. 159 and 386—S. 386, C. P. C., exhaustive—Order directing examination of witness by commission—Judgment—Inherent jurisdiction of Courts to prevent abuse of process.**

S. 386, C. P. C., is exhaustive of the causes in which a court can direct the issue of a commission to examine a witness. *Gopal Chunder Sircar v. Karnodhar Moochee*, 7 W. R. C. R. 349 a case under Act VIII of 1859 followed.

Although on application of a party to a legal proceeding summons to a witness will ordinarily issue and a court is bound to issue a summons under S. 159 except in cases governed by S. 386, C. P. C., a Court has an inherent right to prevent an abuse of its own process and where it is shewn that the process is applied for not *bonafide* for the purpose of obtaining any material evidence the Court will be justified in declining to issue process.

*Per Subrahmania Aiyar, J* :—An order of a single judge directing that a litigant is not entitled to insist on examining a witness in court but that a commission may issue to such witness is a judgment within the meaning of S. 15 of the Letters Patent.

*Per Sankaran Nair, J* :—The High Court has power under the Charter Act to set aside an order passed by the Subordinate Judge refusing to examine a witness by commission and directing him to be examined in Court.

*Virabadrán Chetty v. Nataraja Desikar* ... .. 329

**2. ————— S. 15.—Judgment in a criminal trial—Security for keeping the peace—Criminal trial.**

*Per Sir Subrahmania Aiyar, Officiating Chief Justice* :—

An order of a magistrate requiring a person to give security for keeping the peace under S. 107 of the Cr. P. C. is a "Criminal trial" and any order passed on appeal or in revision in connection

tion with such a proceeding by a single Judge of the High Court is an order passed in a Criminal trial and no appeal will lie under S. 107 of the Cr. P. C. is not a "Judgment" under section 15 of the Letters Patent.

*Per Russel, J.* :—An order of a single Judge refusing to interfere in revision with an order passed by a Magistrate requiring security to be taken under S. 107 of the Cr. P. C., is not a Judgment under S. 15 of the Letters Patent.

*Ramasami Reddi, in re* ... .. 394

**Lien of Vakil** :—See LEGAL PRACTITIONERS ACT.

**1. Limitation Act, S. 7 and Arts 120, 125** :—See HINDU LAW (10).

**2. —————, S. 14.**—*Properties beyond pecuniary jurisdiction of first Court—Person not entitled added as co-plaintiff in first suit—Same course of action—Same cause of action—Same parties.*

Where the plaintiffs as next heirs of the last male-owner brought a suit in the District Munsif's Court for the recovery of certain properties and a third person who, however, was subsequently found to have no real claim was added on that third person's application as a co-plaintiff and on its being found that the value of the properties was beyond the pecuniary jurisdiction of the District Munsif the plaintiffs withdrew a portion of the claim, but the final order was that the plaint should be returned to the proper court

*Held*, (1) that a subsequent suit by the two plaintiffs for recovery of the properties including the properties withdrawn in the course of the first suit was founded upon the same cause of action ;

(2) that such subsequent suit was between the same parties notwithstanding the fact that a third person who, however, was found to have no real claim was added as a co-plaintiff in the first suit on his application ; and

(3) that the plaintiffs were entitled under S. 14 of the Limitation Act to a deduction of the time occupied in prosecuting the first suit.

*Yenkatasubbiah v. Pichamma* ... .. 287

**3. ————— (1877), Arts. 18 and 120.**—*Act IX of 1871 Art. 20—Land Acquisition Act I of 1894, Ss. 17 and 48—Act X of 1870, S. 54—Acquisition of land for public purposes—Direction to vest and take possession—Collector's refusal to make award—Suit for damages—Limitation—One year from refusal.*

S. 54 of the Land Acquisition Act X of 1870, which corresponds to S. 48 of Act I of 1894, does not include a case in which the land is vested in Government.



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Article 18 of the Limitation Act of 1877 (corresponding to Article 20 of Act IX of 1971) refers only to suits for compensation for non-completion and refusal to complete the acquisition referred to in S. 54 of Act X of 1870 (S. 45 of Act I of 1894).

A suit by a person for damages against the Collector for refusing to make an award with respect to lands which had become vested in Government by virtue of a direction under S. 17 of Act I of 1894 is not governed by Art. 18, but by Art. 120 of the Limitation Act, and will, therefore, be within time if filed within 6 years from the date of Collector informing the plaintiff of the refusal to make the award.

Where there is a direction under S. 17 of Act I of 1894 and the Collector refuses to make the award, the owner of the land is not entitled to the land but only to damages against the Collector for the breach of a statutory duty.

*Venkayya v. The Secretary of State for India* ... ..

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4. ————— Art. 96.—*Transfer of debt by creditor—Satisfaction—Taking of pro-note, effect of—Suit to set aside discharge for mistake—Limitation Act XV of 1877, Art. 96—Mistake effect of—Discovery of mistake by one partner, effect of, on another—Contract Act, S. 65—Compensation.*

A transfer by a debtor to his creditor of a debt due to the former cannot operate as a discharge of his debt unless the transfer is accepted as a satisfaction of the debt and not merely as a means whereby the creditor, on realization of the debt assigned to him, may appropriate the same towards the debts due to him from his original debtor.

There can be no ratification of a part of the agent's act except in the sense that it is a ratification of the whole.

Where a pro-note is taken by the creditor from his debtor there is no discharge of the debt by the creditor.

A suit by a creditor for setting aside a discharge made by him on the ground of mistake is governed by Article 96 of the Limitation Act,

Where the mistake is as to the belief of a party that a third person is liable, the mistake must be taken as discovered when the third person repudiates his liability and communicates such repudiation either to the party or to his partner.

Where a right of action is in two or more partners and one of them discovers the mistake by reason of which a contract (in respect of which relief has been sought) has been entered into by another of the partners on behalf of the partnership the period of limitation prescribed by Article 96, will begin to run from the date of such

discovery notwithstanding that the latter partner chooses to persist in his mistake even after the mistake is pointed out to him by the other.

The relief contemplated by S. 65 of the Contract Act is that the party prejudiced by the mistake should be relieved from the consequences thereof.

Where the plaintiffs by mistake released a debt due to them they would be entitled to be placed in the same position as they would be if there had been no release and also compensated for any loss which may have necessarily resulted from the mistake.

Where the debt which was released by mistake was on the date of discovery of the mistake not barred by the statute of limitations the party entitled to relief on the ground of mistake could claim no compensation as no loss was sustained. He can only be entitled to a declaration that the release is void and should be cancelled if in writing.

But where the debt released by mistake is barred at the date of the discovery, there is a loss which is the necessary result of the mistake when relief against the mistake will comprise not only a cancellation of the release but also compensation for the loss.

*Madras Consolidated Sugar and Spirit Factory, Limited v. William Sisamore Shaw* ... 443

1. ———— **Art. 110**—See RENT RECOVERY ACT (1).

6. ———— **Art. 131**—See LANDLORD AND TENANT (1).

7. ———— **Art. 141**—Onus of proof as to the date of widow's death—Widow last heard of prior to twelve years before suit—Presumption of as to time of death—Evidence Act, Ss. 107, 108.

In a suit by a reversioner for possession of lands on the death of a widow the onus is on the plaintiff to show that the suit is brought within 12 years from the widow's death. Where it was proved that the widow was last heard of on a date prior to 12 years before suit, Held that it lay upon the plaintiff to prove that the widow died within twelve years prior to suit; and in the absence of such proof his suit should fail. When the question is not one of death, but death at a particular time, there is no presumption as to such time, but the party who has to make out death at a particular time, must make it out by evidence.

*Venkata Hanumanulu Garu v. Lachchamma* ... 464

1. ———— **Art. 178**:—See CIVIL PROCEDURE CODE, (1).

2. ————, **Arts. 178 and 179**.—Transfer of decrees—Transferee applying for execution—Objection by judgment-debtor—Transfer inami for him—Application dismissed—Suit by transferee for establish-

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*ing right and decree—Application for execution—Revival of former application—Limitation.*

Where the transferee of a decree applies for execution which is rejected on the ground that the transfer is for the benefit of the judgment-debtor and where after establishing his right to execute in a suit he again applies for execution, such application is merely to revive or continue the former application and is governed by Art. 178 of the Limitation Act and not by Art. 179.

*Narayana Nambi v. Pappy Brahmani*, I. L. R., 10 M. 22 overruled.

Time only begins to run from the date of the decree declaring the respondent's right to proceed in execution.

*Suppa Reddiar v. Avudai Ammal* ... .. 401

**Limitation** :—See CIVIL PROCEDURE CODE (15).

———— for application to substitute legal representative :—See CIVIL PROCEDURE (16).

———— suit for damages on Collector's refusal to make order :—See LIMITATION ACT (3).

**Lunacy on head of mutt, effect of** :—See RELIGIOUS ENDOWMENT.

1. **Madras Act II of 1864, ss. 1, 2, 3, 26 and 42 and Madras Act V of 1884 and Act VI of 1900, S. 49** :—See PENAL ASSESSMENT.

2. ———— **II of 1894 and III of 1895, S. 21**.—*Rights of action affected—Pending actions not affected—Adoption made under pollution—Parties of the same gotra—Datta homam not necessary—Statute, construction of—Effect of new statutes on pending actions and procedure.*

When the Legislature alters the rights of parties by taking away or conferring any right of action, its enactment does not affect pending actions unless it applies in express terms to such actions. It is otherwise when an enactment merely affects the procedure. S. 21 of Madras Act, III of 1895, does not negative the application of the above general rule. Madras Act, II of 1894, when extended to the office of Village Accountant in the Venkatagiri Estate did not affect pending suits relating to such office at the time of extension.

When parties are of the same gotra, the performance of *datta homam* is not necessary for the validity of an adoption; so that an adoption made under pollution of the persons giving and taking cause by the birth of the son adopted and the death of the wife of the adoptive father will not be invalid if the parties are of the same gotra.

*Chinna Narasiah v. Mangamma* ... .. 340

**2 ————— II of 1894.—Karnam's emoluments—Possession adverse to office holder—Prescriptive title—Suits cognizable by Civil Courts.**

The ruling in *Velu Pandaram's* case is also applicable to lands alienated by the holder for the time being of the hereditary office of karnam.

Prior to Act II of 1894 being extended to the office of karnam in a permanently settled district, suits in respect of such office and the emoluments thereof were cognizable by Civil Courts and governed by the ordinary Law of Limitation.

A possession, which is adverse to the holder of a Karnam office, is adverse to his successors.

*Neelethalam v. Kamarasu* ... .. 436

**————— III of 1895, S. 5.—Service Inam—Inalienable character of Inam—Decree for sale—Jurisdiction—Waiver—Estoppel.**

The provisions contained in S. 5 of Madras Act III of 1895 are absolute and Civil Courts have no jurisdiction to order sale of inam properties falling within the scope of the Section.

A Court cannot pass a decree for sale of properties declared inalienable by statute, on considerations of Public Policy. If the interdiction upon alienation be only for the benefit of particular persons, or for reasons not based on considerations of public policy, it will be open to parties to waive their objections as to the non-alienable character of the property and be estopped by a decree passed as against them; but where the enactment has, as in the case of S. 5 of Madras Act III of 1895, some object of public policy in view, the rule to enforce the prohibition literally and strictly and no question of waiver or estoppel will arise. *Vasoji Haribhai v. Lallu Akhu*, I. L. R., 9 B. 285, *Sadashiv Lalit v. Jayanti Bai*, I. L. R., 8 B. 185, *Narayana Khandu Kulkarna v. Kalgauda Birdar Patel*, I. L. R., 14 B. 404 distinguished.

*Maharajah of Vixianagaram v. Chelliah* ... .. 468

**1 Malabar Law, Nambudri Brahmins of Malabar.—Junior members of an illom—Right to marry—Custom—Onus.**

The junior members of a Nambudri Illom in Malabar are not prohibited by law or custom from contracting valid marriages in their own community.

The onus of proving that such members cannot validly marry lies on the person who avers it.

*Poppi Anterjanam v. Teyyan Nayer* ... .. 214

**2 ————— Tarwad, meaning of—Tavashi, meaning of—Karnavan's right to renounce Karnavanship—Status of Karnavan—Immoveable property—Registration Act, S. 17.**

**Malabar Law.—Continued.**

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A Karnavan in Malabar is the senior male member of a group of persons all of them tracing their descent in the female line from a common female ancestor (and forming a Marumakkatayam tarwad) owning joint property under the absolute control and management of the Karnavan.

The term tavazhi is used in three senses :—(1) a mother and her descendants in the female line or the line of a single mother ; (2) any branch of a tarwad in separate possession of a portion of the joint family property holding the same for convenience of enjoyment ; (3) a branch of a tarwad separated in interest from the main tarwad. It is then really a tarwad by itself.

It is open to the Karnavan of a tarwad to renounce his Karnavanship including his right to manage the tarwad affairs.

Per Subrahmaniam Aiyar and Boddam, J. J. :—The right to the status of a Karnavan cannot be treated as an interest in immoveable property within S. 17 of the Registration Act.

*Shuppu Me-on v. Narayanan* ... .. 415

**Manager, personal liability of:**—See DECREE IN FAVOR OF MANAGER.

**Matath pat., powers of:**—See RELIGIOUS ENDOWMENT.

**Maxim, 'Nemo ex se delicto meliorem suam conditionem facere potest':**—See HINDU LAW (12).

**Merger of mortgage:**—See CIVIL PROCEDURE CODE (3).

**Minor, duty of court with regard to:**—See CIVIL PROCEDURE CODE (17).

**Mittas, revenue sale for arrears.**—Purchase by Government—Restoration, effect of—Implied grant of customary supply of water—Easements of necessity—Second crop—Levy of water-cess—Supply of water through Government source—Improvements by Government—Second-crop cultivation.

Where the Government purchases a mittas sold for arrears of revenue and restores it to the son of the defaulter, the law will imply that this restoration or grant in the absence of a special contract to the contrary will carry with it all the rights of water and other easements of necessity existing at the time of such restoration or grant.

*Morgan v. Kirby*, I. L. R. 2 M. 46 ; *Chanham v. Fisk*, 37 R. R. 656 followed.

The grantee and those claiming under him will be entitled to the customary supply to his tanks, and when the water arrives in his tanks he can do what he likes with it.

*Watts v. Kelson*, L. R. 6 Ch. 166 and *The Secretary of State for India in Council v. Perumal Pillai*, I. L. R. 24 M. 279 referred to.

... .. a claimant

**Mitta, revenue sale for arrears—Continued.**

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by government to the water flowing in all natural channels which are subject to rights already acquired in water.

In the case of water flowing through a Government source which is improved by Government the Zemindar whose tanks depend for their supply upon the water flowing through such source may be entitled to a certain supply of water free; but the onus of proving the extent of this supply is on the Zemindar, and if he fails to discharge this burden his suit for restraining the Government from levying water-cess for second crop cultivation and for refund of the water-cess collected must be dismissed.

*Maria Susai Mudaliar v. Secretary of State for India in Council* ... 350

**Mohini arrangement by Government.**—*Temple to receive assessment—Effect of arrangement—Res judicata—Certainty of estoppel—Decision in a suit for one fasli how far binding in suit for subsequent fasli.*

Where in lieu of Mohini allowance payable to a temple by the Government the liability of the temple to pay assessment on certain lands was released and for the balance, the Government directed the first crop assessment payable on certain lands by defendant's ancestors to be paid to the temple and the defendant's ancestor executed an undertaking to Government to pay such assessment to the temple and the trustees of the temple also executed Muchilika to Government agreeing to receive the assessment in satisfaction of their claims for mohini, the claim of the temple for such assessment was not based upon any contract between the temple and the choultry irrespective of any possession by the latter of lands. It was a claim to enforce the liability upon property as by the arrangement the lands, the revenue of which was assigned to the temple, became *inam* lands vested in the latter who became entitled to the *melwaram* on such lands.

In a former suit the temple sued the defendant for the *melwaram*.

The defendant contended that he was not in possession of so much of lands as was believed to have been in the possession of the defendant's ancestor at the time of the arrangement. The plaintiff's claim was decreed by the Munsif on the ground that the defendant should seek his remedy from Government and the Sub-Judge confirmed this decree upon the ground that the defendant was precluded from raising his contention by reason of the payments made by his family for a long time upon the whole extent. In second appeal, the High Court held that they "saw no reason to differ from the courts below".

In a second suit by the trustees for the *melwaram* due for different faslis the same contention was raised but the plaintiff pleaded that *res judicata* by the former decision.

**Mohini arrangement by Government.**—*Continued.*

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*Held* (1), that in order to sustain a plea of *res judicata* what was relied upon as estopped must be certain.

(2), that where the first court based its decision upon one ground and the second court upon different and inconsistent ground and the third court simply affirmed the decision of both the courts the decision was uncertain and it would be impossible to say what exactly was decided.

(3), that the decision in the former litigation was not *res judicata* and the defendant was entitled to raise his contention.

(4), that, even apart from this, a decision in a suit for melwaram of one *falsi* would not estop the defendant who was sued for melwaram for subsequent *falsis* from contending that he was not in possession of the lands in respect of which melwaram was claimed and that as such he was not liable although he might have raised the same contention in the suit for the previous *falsi* and the melwaram was decreed against him and although the defendant might not allege that the lands had gone out of his possession subsequent to the previous suit.

A payment made to the temple for a long series of years upon the footing that the defendant and his family had the same extent of lands as they were supposed to possess at the time of the arrangement would not bar the defendant and his family from showing that they had not such extent even at the time of the original arrangement.

*Vythilinga Mudaliar v. Ramachandra Naicker* ... ..

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**Mortgage.**—*Once a mortgage always a mortgage*—*Applicability of doctrine, to mortgages between 1858 to 1882.*

The doctrine of "once a mortgage always a mortgage" adopted by Madras High Court though erroneous as pointed out by the Judicial Committee in *Pattabhiramier's case*, 13 M. I. A. 560 at 562 and *Thambusawmy's case*, I. L. R., 1 M. I at 23 governs mortgages executed subsequent to 1858 and prior to 1875 and between 1875 to 1882 the date when the Transfer of Property Act became law.

*Karuppan Servai v. Alagara Goundan* ... ..

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**Mortgagor and mortgagee.**—*Property mortgaged not belonging to the mortgagor—Decree upon mortgage—Decree-holder purchaser—No second decree for money—No right to recover property not mortgaged.*

A mortgagee, after obtaining a decree for money, is not entitled to another decree for money on the ground that the land mortgaged to him does not belong to his mortgagor,

Where a family consisting of two brothers owned two plots of land and in a partition, each got one plot and one of the brothers mort-

**Mortgagor and mortgagee.—Continued.**

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gaged the plot which fell to the share of the other and the mortgagee obtained a decree for sale of the property mortgaged and purchased it himself, the decree-holder purchaser will not be entitled to recover the plot actually belonging to his mortgagor.

*Lakshamma v. Krishniah* ... .. 490

**Moveable property :—See PENAL CODE (1).****Murder.—Accomplice evidence—Person merely concealing dead body—No accomplice—Necessity of corroboration.**

Held by *Sir S. Subrahmania Aiyar*, Offg. C. J. and *Sir V. Ehashyam, J* (*Boddam J.*, dissenting :—A person who has helped the accused to conceal the corpse of a person murdered or has omitted to give information of the murder is not an accomplice although he may be guilty of an offence either under S. 201 or S. 202 of the Indian Penal Code.

Per *Sir S. Subrahmania Aiyar*: Offg. C. J. :—

The rule that an accomplice must be corroborated in a material particular is a mere rule of general and usual practice, the application of which is for the discretion of the Judge by whom the case is tried.

The rule has no application in the case of an accomplice who is merely a youthful tool in the hands of one who stood to him in *loco parentis*.

An accomplice is a person who is a guilty associate in crime or who sustains such a relation to the criminal act that he can be jointly indicted with the defendant (principal).

Per *V. Bhashyam Aiyangar, J.* :—

The conviction of an accused on the uncorroborated testimony of an accomplice is perfectly legal and a direction to the jury that it will be their duty to convict the accused if they believed the accomplice and gave credit to his evidence is a perfectly legal direction.

A direction to the jury that the evidence of an accomplice is not sufficient to find the accused guilty will be a misdirection.

Per *Boddam J.* :—An accomplice is unworthy of credit unless he is corroborated in material particulars.

Where there is no such corroboration, it will be the duty of a Judge to direct the jury that there is no sufficient evidence before them upon which they will be justified in finding an accused guilty.

A Judge who combines the functions of Judge and Jury is equally bound to scrutinise accomplice evidence with great care and to consider whether there is any corroborating evidence when the main evidence is of an accomplice character.

*Bamasami Gounden v. King Emperor* ... .. 226



**Notice**:—See HINDU LAW (2)

**Notice before review**:—See CIVIL PROCEDURE CODE (31)

**Notice to tenant—omission to give particulars of date—no material irregularity**:—See LANDLORD AND TENANT (4).

**Onus of proof**:—See RAILWAY COMPANY.

**Onus of proof as to the date of widow's death**:—See LIMITATION ACT, (7).

**Onus of proving custom prohibiting marriage**:—See MALABAR LAW.

**Order in claim proceedings—Res judicata**:—See TRANSFER OF PROPERTY ACT (1).

**Oudh Rent Act XXII of 1886, S. 141**:—See INTEREST ACT.

**Parties**:—See HINDU LAW (10).

**Partition—Right of a transferee of a co-tenant's share**:—See TRANSFER OF PROPERTY ACT (1).

**Pasturage, right of**.—Immemorial enjoyment—Presumption—Legal origin.

A claim by some cultivators of certain villages for a customary and immemorial right of pasturage over the waste lands of the villages or of adjoining villages is not one to establish a right in gross.

On proof of enjoyment from time immemorial a legal origin for the right claimed may be presumed.

Reference to English authorities and application of English principles or doctrines deprecated.

A decree establishing such a right of pasturage will not prevent the owners of the lands affected from improving their property provided sufficient pasturage is left and a provision to that effect may be inserted in the decree itself to prevent future disputes.

*Bhola Nath Nundi v. Midnapore Zemindary* ... .. 153

**Payment by agent to third parties**:—See CONTRACT ACT, (1).

**Penal Assessment**—Madras Regulation XXVI of 1802—Madras Act II of 1864, Ss. 1, 2, 3, 26 and 42—Madras Act V of 1884 and Act VI of 1900, S. 49, Proviso, 98, 98-A and 98-B—Government land—Highway Encroachment—Trespasser not a land-holder—Levy of penal assessment—Illegality—Crown prerogative.

“Prohibitory or penal assessment” under the Standing Orders of the Board of Revenue is imposed not because the party assessed is a “land-holder” but because he is not a land-holder and does not lawfully occupy the land for which he is assessed.

Such a levy is therefore illegal and not justified by the Madras Revenue Recovery Act and a person from whom the assessment has been levied may recover it back from Government by a suit in the Civil Courts.

**Final assessment.—Continued.**

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**Per Subrahmanya Aiyar, Offg. C. J.:**—

According to the Madras Regulation, XXVI of 1802, and Madras Act II of 1864, Ss. 1, 2, 3, 26 and 42, the land in respect of which land-revenue is exigible must be vested in some person or persons other than the Crown and the Crown possesses nothing more than a first charge in respect of the revenue due to it upon the interest of such person or persons realizable by sale thereof.

It is the prerogative of Crown to exact from a subject holding arable land, its proper share of produce thereof or the equivalent of such produce which is the modern land revenue.

In the actual exercises of this prerogative, however, the Crown is not supposed to proceed without any regard to definite and well established principles, *i. e.*, it takes a fixed share of the produce—be it the theoretical sixth of the Hindu writings or the one-half nett again and again proclaimed by the present Government.

**Per Boddam J.:**—

Civil Courts are prohibited from going into the question of the amount of an assessment and can only deal with the general question of the liability to assessment.

A person in improper possession of part of the surface of a public road is not a "land-holder" within the meaning of the Revenue Recovery Act (Madras Act II of 1864) and Government has no right to impose any assessment upon him under this Act for such occupation.

It is the prerogative of the Crown to take their share of the produce of land occupied under any such right as can give a saleable interest to the occupier in the land and such as will enable him to be registered under Madras Regulation XXVI of 1802, but this will not justify the Government in assessing a mere trespasser.

The acquisition of a right of way in the public presupposes that the right to the whole surface of the road is vested either by prescription or grant in the public free of any assessment for the use or occupation thereof as such, so long as it exists as a public road and the fact that the freehold of the land is in the Government can only give them the right to deal with so much of the land as is not required by the public for the purposes of the road.

**Per Bhashyam Aiyangar, J.:**—

Where land is a portion of the "Gramanattam" or "Village-site", the freehold in the soil is presumably in the Government.

When a street vests in the District Board under Madras Act V of 1864, only the surface and so much of the air space above and so much of the soil below the surface as is reasonably necessary for

**Penal assessment.—Continued.**

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the District Board adequately to maintain and manage the street as a street vests in the District Board but this vesting does not transfer to the District Board the ownership in the site or soil over which the street exists.

The proviso to S. 47 of Act V of 1884 empowers the Governor-in-Council from time to time (by notification) to exclude any road or street from the operation of the Act and this notification will have the effect of divesting the District Board of roads or streets already vested in it under the Act.

A street in a 'Gramanattam' between two rows of houses is not necessarily a highway and it may merely be land belonging to Government, over which, however, there is a right of way to the houses or buildings on either side.

Any obstruction to a highway not vested in the District Board may be dealt with under Ch. X of the Criminal Procedure Code while an obstruction to a highway vested in the District Board may be dealt with under Ss. 98-A and 98-B of Act V of 1884 (as amended by Act VI of 1900.)

A person encroaching on a highway or Crown land over which there is a right of way in favour of the inhabitants of the street is not a "land-holder" within the meaning of Act II of 1884 or otherwise.

Civil Courts have jurisdiction to decide whether or not the land or person is under liability to be assessed to land-revenue.

*Sri Uppa Lakshmi bhayamma Garu v. Purvis*, 2 M. H. C. R. 167. *The Secretary of State for India in Council v. Ram Ugrah Singh*, I. L. R., 7 A. 140, and *The Government of Bombay v. Sundarji Savram*, 12 Bom. H. C. R. App. 275 followed.

The practice of levying 'penal charges' or "prohibitory assessments" recognised by the Standing Orders of the Board of Revenue though of long standing has no legal origin and such a levy is illegal for the following reasons :—

- (1) Highways and other poramboke lands set apart for public or communal purposes are not liable to be assessed to land-revenue so long as they continue as such and have not been lawfully transferred to the head of 'Ayan.'
- (2) A person encroaching upon highways or poramboke lands set apart for public purposes can in no sense be regarded as a 'land-holder' or ryot in respect of the land encroached upon.
- (3) In the case of all lands, whether of poramboke or Ayan, any demand which on behalf of the Crown may be made on the occupant thereof with the avowed object of compelling him to surrender or vacate the land is not the imposition of land-revenue, and the

machinery provided by Act II of 1864 cannot be resorted to for enforcing such demand by Revenue Officers, choosing to give it the name of 'assessment.'

(4) The immemorial and common law prerogative of the Crown in India is only to the *Rajabhogam* or King's share in the produce of the land and the land revenue or assessment now levied on land represents the King's share in the produce and Courts have no jurisdiction to question the rate or share that the Executive Government may fix at the periodical revision of assessments. But a share of the produce—however high the share or rate may be in relation to the total produce, cannot exceed the produce.

(5) An assessment which is prohibitive and manifestly in excess of what the land may produce and is professedly out of all proportion to such produce is clearly *ultra vires* of Government and such action of the executive is not exempted from the jurisdiction of the Civil Courts.

Whether *Muthayya Chetti v. Secretary of State for India*, I. L. R., 22 M. 100 rightly lays down the law for the Town of Madras:—  
Quere.

Lines as to the course which Legislation should take for preventing encroachments upon Government lands, for protection of public right and claims in India and for the Law of Limitation as regards public rights and claims as distinguished from Crown rights and claims suggested.

*Ramaya v. The Secretary of State for India* ... .. 37

1. Penal Code ss. 22 and 378.—Stones quarried from the earth—Moveable property—Theft.

Any part of the earth whether it be stones or sand or clay or any other component when severed from "earth" is moveable property and is capable of being the subject of theft under S. 378 of the Indian Penal Code.

*The Queen v. Tamma Ghanaya*, I. L. R., 4 M. 228 *Queen-Empress v. Shieram* I. L. R., 15 B. 702, and opinion of Brandt J in *Queen-Empress v. Kotayya* I. L. R., 10 M. 255 followed. *Queen-Empress v. Kotayya* (opinion of majority not followed.)

Land and earth are not synonymous and there is a wide distinction between "earth" and the "earth."

*Venkatappaya Sastri v. Madula Venkanna* ... .. 155

1. ———— ss. 301, 302:—See MURDER.

2. ———— s. 199:—See CRIMINAL PROCEDURE CODE (3).

3. ———— s. 378.—Palk's Bay—Gulf of Mannar—Chanks—Subject of theft—*Fora natura*—Property in Chank-beds

**Penal Code—Continued.**

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Palk's Bay being an arm of the sea land-locked by His Majesty's Dominions and the islands in it also forming part of his territories is not to be regarded as an open sea outside the territorial jurisdiction of His Majesty, but is an integral part of His Majesty's Dominions.

Chanks are not fish. They are not *feras naturæ* but are *domitæ naturæ* and must be placed in the same category as oysters so as to be the subject of theft.

The Rajah of Ramnad has the monopoly of taking chanks in Palk's Bay, and he or the person claiming under him must in law be regarded as being in possession of the chank-bed *propter impotentiam*.

A person taking chanks out of the chank-bed in the possession of the Raju removes movable property out of the possession of the Raja and will be guilty of theft under S. 379, Indian Penal Code.

The Gulf of Mannar is also similar to Palk's Bay and chanks in the chank-beds of that Gulf may also be subjects of theft.

*Annakumar Pillai v. Muthupayal* ... .. 248

**Penalty** :—See CONTRACT.

**Personal covenant in mortgages** :—See TRANSFER OF PROPERTY ACT (3).

**Personal Inam** — *Enfranchisement in favour of widow, effect of.*

The enfranchisement of a personal inam in favor of a widow does not vest in such widow an absolute estate. She has only a qualified estate and any alienation by her without necessity will not be binding on the reversioners.

*Cherukuri Venkanna v. Manthravathi Lakshmi Narayana Sastrulu*,  
2 M. H. C. R. 327 followed.

*Subba Naidu v. Nagayya*, 13 M. L. J. B., 89; S. C. I. L. R., 25 M.  
424 doubted.

*Venkata Dikshatulu v. Gavaramma* ... .. 306

**Personal liability of manager** :—See DECREE IN FAVOR OF MANAGER.

"Possession," meaning of :—See CONTRACT ACT (3).

**Practice-parties** :—See TRANSFER OF PROPERTY ACT, (4).

**Practice-second counsel** :—See RELIGIOUS ENDOWMENT.

**Preliminary issue, order upon** :—See CIVIL PROCEDURE CODE (15).

**Presumption of legal origin from immemorial enjoyment** :—  
See PARTURAGE.

**Principal and Agent** :—See CONTRACT ACT (1).

**Privy Council Practice** :—See SPECIFIC RELIEF ACT (3).

**"Procedure"** :—See CIVIL PROCEDURE CODE, (20). Page.

**Promissory note, how far a payment.**—Covenant to pay by Vendee to Vendor's creditor—Delay in payment—Execution of Promote by Vendor to creditor—Suit by Vendor for breach of covenant.

Where a vendee fails to pay the purchase money to the creditor of the vendor in pursuance of a covenant in the deed of sale, but paid the same a year after the said suit by the vendor against the vendee for breach of covenant is not sustainable without proof of damage.

The mere execution by the vendor of a pro-note for interest due to the creditor subsequent to the sale without actual payment is not proof of such damage.

*Doraisami Tevar v. Lakshmanan Chetty* ... .. 285

**Proof of parol evidence** :—See CONTRACT OF SALE OF GOODS.

**Promote** :—See ACT I OF 1897.

**Promote payment by** :—See LIMITATION ACT (4).

**"Property"** :—TRANSFER OF PROPERTY ACT (1).

**Provincial Small Cause Court Act, Arts. 38, 41.**—Decree for maintenance against our brothers—Payment by a representative of one—Claim for contribution—Cognizable by Small Cause Court.

A claim for contribution in respect of sums paid by the representatives of a Judgement-debtor to satisfy a decree passed against the latter and his three brothers for maintenance which, however, was not made a charge on property, is one cognizable by the Court of Small Causes and does not fall under Art. 38 or Art. 41 (first part) of the Provincial Court of Small Causes and, therefore, no second appeal lies under S. 586, C. P. C.

The anterior liability which led to the decree for maintenance being passed does not affect the question.

*Ramaswamy Pantulu v. Narayanamoorthy Pantulu* ... .. 420

**Railway Company.**—"Risk Note"—Goods lost in transit—Exemption from liability—Onus of proof.

Where goods are carried by a Railway Company under the terms of a "Risk Note" (by which the Railway Company is not liable for any loss, destruction or deterioration of or damage to the goods before, during, or after transit) the Railway Company is not liable for failure to deliver the goods if they are lost in transit.

If the consignor should assert that the goods were not lost but delivered to a wrong person, the onus lay upon him to prove his case.

**Railway Company—Continued.**

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The onus is on the plaintiff (consignor) to show that the circumstances under which the goods disappeared were not such as to amount to "loss" within the meaning of the "Risk Note."

The Railway Company is not bound to show by affirmative evidence that it has lost the goods.

*Mulji Dhanji Seit v. The Southern Mahratta Railway Company* ... 396

**Registration Act, s. 17 :—See MALABAR LAW.****Registration of document—Transfer of property—Consideration that transferee should give daughter in marriage.**

Mere registration of an instrument without reference to other circumstances does not operate to transfer property comprised in the instrument. *Ponnayya Goundan v. Muthu Goundan I. L. R., 17 M. 146* distinguished.

Where it is proved that the consideration for a document as expressed in it is not the real one and that the real consideration for the transfer of property is the gift by the transferee of his daughter in marriage to the transferor (and not the mere promise to give) and the transferee subsequently refuses to give his daughter in marriage, although the transferor registers the document evidencing the transfer of property while retaining possession of the document and the property, the transfer is conditional upon the event of the marriage taking place and no property would pass if the condition fails to take effect.

*Ramalinga Mudaly v. Aiyadorai Nainar...* ... 493

**Regulation VII of 1817.—Duty of Legal Agents—Powers of manager to lease—Effect of Regulation on such powers—Granting of permanent lease, when valid—Ulavadai Mirasdars and Purakudi, meaning of.**

Regulation VII of 1817 vested the general superintendence of all charitable endowments "in land or money" in the Board of Revenue, and made it the duty of the local agents of the Board (of whom the Collector was one *ex-officio*) to report to the Board "any instance in which they may have reason to believe that lands, or buildings, or the rents or revenues derived from lands, are unduly appropriated," care being taken not to infringe private rights.

The effect of the Regulation is to supersede the powers of Managers to alienate charitable property and to sanction the revision of existing appropriations if unduly made.

The granting of a lease conferring a permanent and heritable title with fixed rents will be liable to objection on the ground that "to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time would be a breach of duty" in the trustee, unless there be special circumstances of necessity to justify it.

**Regulation—Continued.**

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*Maharanes Shibessouree Debia v. Mothooranath Acharjo* (1889) 13 M. I. A. 270 (275), referred to.

The expression "Ulavadai Mirasdars" does not appear to have a well established meaning and does not import that the person holds a permanent and heritable tenure.

The term "purakudi" has a well-understood and definite meaning and does not imply a right of permanent occupancy.

*Chockalingam Pillai v. Vythealinga Parvata Sannadhi* (1871) 6 M. H. C., 164, and *Thiagaraja v. Oiyana Sambanda Pandara*, (1887) I. L. R., 11 M. 77, approved, *Krishnasami Pillai v. Vardaraja Ayyan gar*, (1883) I. L. R., 5 M 354, referred to.

*Mayandi Chettiyar v. Chokkalingam Pillai* ... .. 200

**Religious Endowment—Mutt—Headship of Mutt—Corporation sole—  
Effect of lunacy—Vacancy—Powers of Matadhipati—Practice—Second  
Counsel.**

The head of a mutt being a corporation sole does not forfeit his position by his subsequent lunacy. He is not a mere trustee and his subsequent lunacy does not create any vacancy in his office.

A debt incurred by the head of a mutt, though proper and appropriate with reference to the head who incurred it will not bind the property of the institution in the hands of his successors if the debt is not shown to have been incurred for a purpose necessary for the maintenance of the institution as a mutt. *Sammantha Pandara v. Sellappa Chetti*, I. L. R., 2 M. 175 discussed.

Per *Subrahmania Iyer*, Offg. C. J. :—

The law gives heads of mutts full powers of disposition over what remains of the income after defraying the established charges of the institution while in respect of the corpus it treats the individuals composing the line of succession as if they were tenants for life.

The consecrated idol in a Hindu temple is a juridical person.

In the case of mutts the ideal person is the office of the spiritual teacher (Acharya) which, as it were, is incarnate in the person of each successive Swami who for the time is a real owner and not a mere trustee.

Per *Bhashyam Aiyangar*, J. :—

Property of a mutt like the benefice of a bishopric of the Christian church is substantially inalienable.

The head of a mutt has absolute dominion over the revenues accruing during his lifetime subject, however, to the limited burden of maintaining the mutt.



**Religious endowment—Continued.**

The conception of a "corporation" is not foreign to the Hindu Law and has been worked out not only in respect of religious foundations and eleemosynary institution but also in respect of lay institutions and offices.

A second counsel can be heard for the same party.

*Vidyapurna Thirtha Swami v. Vidyavidhi Thirtha Swami* ... 105

**Religious endowment, power of manager to lease :—See REGULATION VII of 1817**

- 1. Rent Recovery Act, Ss 2, 3, 4, 7, 9, 14, 15, 16, 38, 41, 46, 69 and 97—Limitation Act, Art 110—Suit for enforcement of patta and execution of muchilika pending—Rate of rent in suspense—Rent not in arrear unless ascertained—Rent in arrear by custom—Customary rule modified by Statute**

The point of time from which under the Limitation Act, Art. 110, the period of limitation for a suit for arrears of rent is to run is that at which the arrear becomes due.

In most cases and by the custom of the country agricultural rents are payable at or before the close of the fasli year and legislation or custom, or express contract or the special circumstances of any case may make rent become due at a point of time different from the close of the period in respect of which it is to be paid.

The object of a Limitation Act being presumably to compel people who have actionable claims to sue upon them with due promptitude or to forfeit the right to do so at all, the falling due of rent naturally means the falling due of an ascertained rent which the tenant is under an obligation to pay and which the landlord can claim and, if necessary, sue for.

As long as proceedings under S.9 of the rent Recovery Act are pending before the Collector and, on appeal from him (under S. 69) before the Civil Courts, the rate of rent is in suspense, for no one can say what it will prove to be, and, therefore, no arrear of rents can be said to have become due within the meaning of the Limitation Act until those proceedings are finally determined and whether in those proceedings the patta tendered has been approved or modified.

Summary remedies, such as distress, sale of holding, ejectment and arrest are available for arrears of rent and must be put in force within one year from the time when the arrears become due and proceedings in these cases must commence with a document stating the amount of rent due. Even here the rent becomes due when it is ascertained and it becomes ascertained when the proceedings taken under S. 9 become final.

S. 7 of the Rent Recovery Act is not an enabling but a restraining section.

**Rent Recovery Act—Continued.**

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S. 14 of the Rent Recovery Act, though it seems to define the point of time at which agricultural rent becomes an arrear at the close of the fasli year applies only to ascertained rents not to rents the rate of which have yet to be determined.

In proceedings under S. 9 where there is an appeal from the Collector's judgments to the Civil Courts under S. 39, the decree of the High Court finally determines as between the landlord and tenant the conditions of the tenancies including the rates of rent.

Where, therefore, a Zemindar, a "Landlord" within the meaning of the Rent Recovery Act sued his ryot, a tenant under the Act for enforcement of a patta and acceptance of a muchilika for faslis 1295 to 1298, and the patta tendered was modified ultimately and the landlord within 3 years of the final decision but after the lapse of 3 years from the close of the respective faslis sued for rent due for the said faslis :

*Held* (1) that the rent was not ascertained until the proceedings taken under S. 9 terminated, the rate of rents being in suspense during the time, and

(2) that the suit for rent was not barred by Limitation Act, Art. 110.

*Sriramulu v. Sobhanadri Appa Rao*, I. L. R., 19 M. 21 reversed.

*Rajah Rangayya Appa Rao v. Sriramulu* ... .. 1

2 ——— **Ss. 2, 14 and 38.**—*Arrear of rent for more than a year—Legality of attachment or distraint.*

An attachment of the tenant's immoveable property or a distraint of the tenant's moveables made by the landlord more than a year from the time rent became due as specified in the patta tendered by the landlord to the tenant would be illegal as being out of time under Ss. 2 and 14 of the Rent Recovery Act.

*Appayasami v. Subba*, I. L. R., 13 M. 463, overruled. *Tayamma v. Kolandavelu*, I. L. R., 12 M. 465, approved.

Rent or any instalment of rent is deemed an arrear according to S. 14 of the Rent Recovery Act if it is not paid on the date on which it is payable according to the terms of the patta or custom although no tender is made prior to the date on which the rent or instalment has become payable, but is postponed to the end of fasli.

Tender is only a condition precedent to the institution of the legal proceedings for the recovery of the arrear of rent, but has not the effect of preventing limitation from running.

*Rajagopalachari v. Lakshminaras...* ... .. 67.

3 ——— **Ss. 3 & 612.**—*Surrender of tenancy—Intermediate landlord.*  
S. 12 of the Rent Recovery Act does not apply to a person who is in

**Rent Recovery Act—Continued.**

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the position of an intermediate landholder who though paying rent to a superior landlord under an arrangement which amounts to a lease in perpetuity or for a term of years receives rent in turn from his tenants.

*Appasami v. Ramasubba*, I. L. R., 7 M. 262, *Subbaraya v. Srinivasa*, I. L. R., 7 M. 508, *Baskarasami v. Sivasami*, I. L. R., 8 M. 196, and *Ramachandra v. Narayanasami*, I. L. R., 10 M. 229, overruled. *Ramasami v. Bhaskarasami*, I. L. R., 2 M. 67 and *Lakshminarayana Pantulu v. Venkatarayanam*, I. L. R., 21 M. 116, followed.

The lessees of a melvaram are farmers under an Inamdar and belong to the class of landholders specified in S. 3 of the Rent Recovery Act.

*Nellayappa Pillaiyan v. Pandara Sannadhi* ... .. 81

**Representative** :—See CIVIL PROCEDURE CODE, (13).

**Reside, meaning of** :—See CIVIL PROCEDURE CODE, (5).

1. **Res-judicata** :—See CIVIL PROCEDURE CODE, (3).

2. ————— See CIVIL PROCEDURE CODE (4).

3. ————— :—See CIVIL PROCEDURE CODE (15).

4. ————— in execution :—See TRANSFER OF PROPERTY ACT, (5).

**Restitution** :—See DECREE IN FAVOR OF MANAGER.

**Revenue Recovery Act (Madras) II of 1864, S. 40**—Collector of the District entitled to confirm revenue sale—Power to revise order of Deputy Collector—Restitution—Appeal—No revision.

No application for revision will lie to the High Court where the order sought to be revised is capable of being appealed against.

Under the Revenue Recovery Act only the Collector of the District is entitled to confirm sales held for arrears of revenue and to issue certificates of sale.

An order of the Deputy Collector confirming a revenue sale is liable to confirmation, modification or annulment by the Collector of the District under the provisions of Madras Act VII of 1867 taken with Madras Regulation VII of 1828.

Where a District Munsif awards possession under S. 40 of Madras Act II of 1864 to a purchaser in revenue auction, he can order restitution on the sale being set aside.

*Gnana Sambanda Pandara Sannadhi v. David Nadar* ... .. 483

**Revenue sale** :—See MITTA.

**Review of decree after appeal** :—See CIVIL PROCEDURE CODE (22).

**Review order without notice** :—See CIVIL PROCEDURE CODE (21).

**Right to sue for administration** :—See CONTRACT ACT, (4).

**Riparian rights**—*Injunction*—*Riparian proprietor*—*Right to raise bund*  
—*Ordinary flood*—*Land of neighbouring owners affected*—*Prescriptive*  
*right to throw back water.*

Where the erection of a bund by the plaintiff will have the effect of throwing upon the defendant's land more water than has customarily flowed on to it and of thus increasing the damage to which he has been hitherto subject, the plaintiff will not be entitled to an injunction to restrain the defendant from interfering with the erection of the bund.

Every land owner exposed to the inroads of the sea has the right to protect himself by erecting such works as are necessary for that purpose, and if he acts *bona fide* is not liable for any damage occasioned to his neighbours who must protect themselves.

*Rez. v. Pagham Commissioners*, 32 R. R. 406, referred to.

But except in the case of extraordinary floods, such large powers for protection are not given to riparian owners who have a right to protect their lands with reference to ordinary floods only if they do so without injury to others.

*Rez. v. Trafford*, 34 R. R. 680, referred to.

A proprietor of land on the bank of a river ought to be restrained from erecting a mound, which, if completed, will in times of ordinary flood throw the waters of the river on to the grounds of a proprietor on the opposite bank so as to overflow and injure them.

*Menzies v. Breadalbane*, 3 Bligh N. S. 414, followed.

Per Russell, J.:—A prescriptive right to throw back water and keep it standing on the land of another exists only in the case of water flowing in a defined stream and cannot apply to surface water not flowing in such a stream.

*Robinson v. Ayya Krishnama Chariar*, 7 M. H. C. 37, followed.

*Semble*:—(Per Subrahmania Iyer, O. C. J.). A Court will not grant an injunction in plaintiff's favour where there has been nothing more than mere assertions on the one hand and denials on the other as to the right of the plaintiff to raise a bund.

*Venkatachalam Chettiar v. Gaurivallaha Thevar* ... .. 162

**Sale**—*Extent sold*—*Boundaries and area sold not corresponding*:—See TRANSFER OF PROPERTY ACT (1).

**Service Inam**:—See MADRAS ACT, III OF 1895.

**Specific performance**.—*Compromise*—*Consideration*—*Security of title and immunity from future attacks*—*Conduct of party derogatory of right compromise*—*Failure of consideration.*

A compromise of a suit made between the adopted son of the last male owner and an alienee who was a reversioner and who would

**Specific performance—continued.**

have been the presumptive reversioner but for the adoption, to the effect that the alienee should not question the title of the adopted son thereafter, and that the latter should confirm a portion of the patni leases and also agree to settle on the wife of the alienee benami for the latter in permanent ijara certain other properties when it should come into his khas possession is not for an executed consideration.

The consideration for the compromise was to obtain security of the adopted son's title to the Zemindari and immunity from future attacks, and where the alienee immediately after such compromise questioned the title of the adopted son, there was a failure of consideration so as to disentitle the alienee and his heirs from claiming specific performance of the remaining parts of the agreement. Although there is no necessary inconsistency in a party who has unsuccessfully tried to rescind an agreement afterwards claiming performance of it, yet where the conduct of the party is such as to amount to a total failure of consideration and is at variance with and amounts to a subversion of the relation intended to be established by the agreement, he will not be entitled to claim specific performance.

*Srish Chandra Roy v. Ray Banomali Rai Bahadur...*

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**1. Specific Relief Act, S. 42.—See HINDU LAW. (10).**

**2. Specific Relief Act, S. 42.—Judicial discretion—Hindu Law—Widow—Execution of will—Declaratory decree—No ground for reversioner—Discretion exercised—Privy Council Practice—Interference with the declaratory decree granted by the lower court—Effect of declaratory decree in favour of reversioner.**

Under S. 42 of the Specific Relief Act a claim to a declaratory decree is not a matter of right but rests with the judicial discretion of the courts.

The execution of a will by a limited owner such as a widow is not as a general rule, a sufficient reason for granting a declaratory decree.

The Privy Council although sitting as a Court of First Instance will not have themselves granted a declaratory decree are always slow to reverse the decisions of the Indian Courts made in the exercise of a discretion entrusted to them by law.

A special reason assigned by the Judicial Committee for refusing to disturb the decisions of the Court below granting a declaratory decree was that although when the will was made by the widow it was doubtful on what ground she relied in making the will, it was

**Specific Relief Act—Continued.**

clear from her conduct in the pleadings that she was setting up a title inconsistent with the rights present or future of any reversionary heir.

A decision in such a suit as to the position of the plaintiff as the next reversionary heir was only a decision as between the parties to the suit and would settle nothing as to who should succeed when the inheritance should open on the death of the widow.

*Thakurain Jaiyal Kumtar v. Bhaiya Indar Bahadur Singh* ... 149

3. ————— **S. 42.—Maintainability of suit—Right of pujari to use articles for worship and to access—Injunction—Failure to ask for possession.**

Where a person has only a right of access to a certain house and the use of certain articles kept therein for the purpose of performing worship in a certain temple he need not sue for possession. A suit by him for a permanent injunction under the circumstances is maintainable and will not be barred by his failure to claim possession.

*Vengan Poosari v. Patchamuthu* ... 290

4. ————— **S. 42—Suit for declaration :—See HINDU LAW (12).**

**Spiritual office—Inam.—Nature of estate—Effect of inam patta.**

Where land is held by a person as emoluments attached to a spiritual office in a village (the right to appoint to the office being vested in the Brahmin Community of the village) such person is entitled to hold the land so long as he is the holder of the office and any alienation of the land to a stranger will be void as against the rightful holder.

Where an inam title-deed is granted by the Government to the holder for such lands and the title-deed contains a term that the inam is the absolute property of the holder which he may hold or dispose of, as he thinks proper, the stipulation has operation only as between the holder and the Government but does not alter the nature of the estate taken under the original grant.

*Pakkiam Pillay v. Seetharama Vadhyar* ... 134

**Statute construction :—See HINDU LAW, (10).**

————— :—See MADRAS ACT II of 1884.

**Subordinate Court, meaning of :—See CRIMINAL PROCEDURE CODE, (8).**

**Suits Valuation Act, VII of 1887, ss. 8 and 9 :—See COURT FEES ACT, (2)'**

**Suit to set aside alienation :—See HINDU LAW, (10).**

**Surety of judgment-debtor—suit for exemption from liability:**

—See CIVIL PROCEDURE CODE, (12).

**Tarwad, meaning of:**—See MALABAR LAW.

**Tavashi, meaning of:**—See MALABAR LAW.

**Temple inam:**—See LANDLORD AND TENANT. (1).

**Theft:**—See PENAL CODE. (1).

**Tort.**—*Suit for damages for injury to wall—Contributory negligence.*

In a suit for damages for injury to the plaintiff's wall, it was found that plaintiff's damage was contributed to by plaintiff's letting his domestic refuse water into the drain, and was not caused solely by any acts or omissions of the defendants.

*Held:*—That the plaintiff was not entitled to any relief.

*Karur Municipal Council v. Srinivasa Aiyangar* ... .. 466

**1. Transfer of Property Act, S. 44.**—*Transferee of a portion of the property as opposed to a transferee of a share of the whole—Right to sue for partition—Right of lessee for a term of a share in a village—Order in claim proceedings—Res-judicata—Specification of boundaries sold—Extent not corresponding—Presumption as to area sold.*

A transferee of a portion of the co-tenancy cannot maintain a suit for partition of the portion transferred to him whether for a term or in perpetuity.

*Parbati Churn Deb v. Ain-ud-Deen*, I. L. R., 7 C. 577 referred to.

A transferee of an interest in the share of a co-owner may enforce, under S. 44 of the Transfer of Property Act, a partition of the same so far as it is necessary to give effect to such transfer.

A lessee of a share in a whole village is not a transferee of an interest in a portion of the village and is, therefore, entitled to sue for a partition which is to last during that term.

*Baring v. Nash*; 1 Ves and Benmes, 551, *Heaton v. Drearden*, 16 Beav. 147 referred to.

Where a claimant does not bring a suit within one year to set aside an adverse order passed against him in the claim proceedings the order is *res judicata* against the claimant in subsequent proceedings and it is not open to the claimant in such subsequent proceedings to contend that in truth and fact the claimant's interest was not attached.

As a general rule in the absence of anything in the context it must be taken that all the property comprised within the boundaries are offered for sale and purchased if the vendor or judgment-debtor has title to the whole property comprised within the boundaries

**Transfer of Property Act—Continued.**

though the extent specified in the document may not exhaust the area.

If the vendor or judgment debtor had no title to some part of the area comprised within the boundaries, the conveyance would not of course operate upon such portion and in those circumstances it may also be presumed that all that is offered for sale is the portion to which the vendor or judgment-debtor has title and the extent specified corresponds to such portion.

*Ramaswami Chetti v. Alagirisami Chetti* ... .. 14

2. ——— **Ss. 51 and 108** :— *See* LANDLORD AND TENANT (2).

3. ——— **Ss. 58 (a) and (b), 67, 68 and 98**—*Mortgage—Combination of usufructuary and simple—Redemption by paying mortgage-money within a year—Covenant to pay.*

Where by a mortgage instrument the mortgagor gives possession of the mortgaged property to the mortgagee and states that the mortgagor shall cause the money to be paid within a certain date and redeem or recover back the land by paying the money on a certain date in a particular year, but that if he does not so pay within the said period and recover the land, he may pay the money on the corresponding date of any future year and recover back the land :—

*Held*, (1) that there is a covenant or promise on the part of the mortgagor to pay the mortgage money,

(2) that the mortgage is a combination of a simple and an usufructuary mortgage within the meaning of S. 98 of the Transfer of Property Act,

(3) that the right to cause the mortgaged property to be sold in default of payment is implied within the meaning of S. 58, cl. (b), and

(4) that the mortgagee is entitled to a decree for the mortgage-money under S. 68, cl. (a) and a decree for sale under S. 67.

*Kangay Gurukkal v. Kalimuthu Annari* ... .. 61

4. ——— **S. 85**.—*“Property—Physical property—Prior mortgagee not made party in the Lower Appellate Court—Practice—Parties.*

In appeal from the Munsif's decree in a suit upon a mortgage, a prior usufructuary mortgagee of certain items of the suit property was not impleaded and the plaintiff agreed to take a decree subject to the prior mortgagee's rights, and accordingly a decree was passed in plaintiff's favor.



**Transfer of Property Act—Continued.**

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*Held*:—That the property mortgaged to the plaintiff was not merely the equity of redemption, but the actual property; and that the prior mortgagee was a necessary party to the appeal before the lower appellate Court.

*Ammayi Ammal v. Rathna Pathan* ... .. 467

**5. ————— S. 90. — Execution, order in, res judicata.**

Where an order was passed allowing execution to issue against properties other than that mortgaged and comprised in the decree a subsequent objection that no sale of such properties could be held in the absence of a decree under S. 90 of the Transfer of Property Act could not be allowed to prevail.

*Lakshmi Ammal v. Subramania Pillai* ... .. 103

**Transfer of Property** :—See REGISTRATION OF DOCUMENT.

**Vakils' lien** :—See LEGAL PRACTITIONERS ACT.

**Village Munsif a Court** :—See CRIMINAL PROCEDURE CODE, (3).

**Ulavadai Mirasdars and Purakudi, meaning of** :—See REGULATION VII OF 1817.

**Wagering Contract** :—See CONTRACT ACT, (1).

**Water, supply of, through Government source** :—See MITTA.

**Waiver** :—See MADRAS ACT III OF 1895.

# The Madras Law Journal Reports.

PART I.]                      JANUARY, 1904.                      [VOL. XIV.

## JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(FROM THE MADRAS HIGH COURT.)

Present :—Lord Macnaghten, Lord Lindley, Sir Andrew Scoble  
and Sir Arthur Wilson.

Rajah Rangayya Appa Rao                      ...                      ... Appellant.\*

v.

Sriramulu and others                      ...                      ... Respondents.

*Madras Rent Recovery Act, Ss. 2, 3, 4, 7, 9, 14, 15, 16, 38, 41, 46, 69 and 87, Limitation Act, Art. 110—Suit for enforcement of patta and execution of muchilika pending—Rate of rent in suspense—Rent not in arrear unless ascertained—Rent in arrear by custom—Customary rule modified by Statute.*

Rajah  
Rangayya  
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Sriramulu.

The point of time from which under the Limitation Act, Art. 110, the period of limitation for a suit for arrears of rent is to run is that at which the arrear becomes due.

In most cases and by the custom of the country agricultural rents are payable at or before the close of the fasli year and legislation or custom, or express contract, or the special circumstances of any case may make rent become due at a point of time different from the close of the period in respect of which it is to be paid.

The object of a Limitation Act being presumably to compel people who have actionable claims to sue upon them with due promptitude or to forfeit the right to do so at all, the falling due of rent naturally means the falling due of an ascertained rent which the tenant is under an obligation to pay and which the landlord can claim and, if necessary, sue for.

\* 2nd December 1903.

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As long as proceedings under S. 9 of the Rent Recovery Act are pending before the Collector and, on appeal from him (under S. 69) before the Civil Courts, the rate of rent is in suspense, for no one can say what it will prove to be, and, therefore, no arrear of rent can be said to have become due within the meaning of the Limitation Act until those proceedings are finally determined and whether in those proceedings the patta tendered has been approved or modified.

Summary remedies, such as distress, sale of holding, ejectment and arrest are available for arrears of rent and must be put in force within one year from the time when the arrears become due and proceedings in these cases must commence with a document stating the amount of rent due. Even here the rent becomes due when it is ascertained and it becomes ascertained when the proceedings taken under S. 9 become final.

S. 7 of the Rent Recovery Act is not an enabling but a restraining section.

S. 14 of the Rent Recovery Act, though it seems to define the point of time at which agricultural rent becomes an arrear at the close of the fasli year applies only to ascertained rents not to rents the rates of which have yet to be determined.

In proceedings under S. 9, where there is an appeal from the Collector's judgment to the Civil Courts under S. 69, the decree of the High Court finally determines as between the landlord and tenant the conditions of the tenancies including the rates of rent.

Where, therefore, a Zemindar, a "Landholder" within the meaning of the Rent Recovery Act sued his ryot, a tenant under the Act for enforcement of a patta and acceptance of a muchilika for faslis 1295 to 1298, and the patta tendered was modified ultimately and the landlord within 3 years of the final decision but after the lapse of 3 years from the close of the respective faslis sued for rent due for the said faslis :—

*Held* (1) that the rent was not ascertained until the proceedings taken under S. 9 terminated, the rate of rent being in suspense during that time, and

(2) that the suit for rent was not barred by Limitation Act, Art. 110.

*Sriramulu v. Sobhanadri Appa Rao* ', reversed.

Their Lordships' Judgment was delivered by

*Sir Arthur Wilson* :—The appeal raises a question of considerable importance in Madras, and as to which there has been some difference of opinion amongst the learned Judges of the High Court.

The plaintiff (appellant) is the Zemindar of Nuzvid, and is a "landholder" within the meaning of the Rent Recovery Act (Madras Act VIII of 1865). The several defendants hold lands under

him in the village of Mustabada, which is included in his Zamin-dari, and they are "tenants" within the meaning of the Act.

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The defendants occupied the lands to which the present controversy relates for a long period, but the time which has to be considered in this appeal commences with the fusli year 1295. In that year the plaintiff tendered puttahs which the defendants refused to accept (similar proceedings took place in the subsequent years). The plaintiff thereupon instituted summary suits before the Collector to enforce the acceptance of the puttahs and the execution of corresponding muchilikas. The Head Assistant Collector, who heard the cases, made his order modifying the terms of the proposed puttahs and directing the tender of puttahs embodying his modifications. The District Judge on appeal made additional changes in the puttahs. On further appeal the High Court again varied the terms of the puttahs to be tendered; and thus by the decree of the High Court, dated the 29th October 1889, the conditions of the tenancies, including the rates of rent, were finally determined.

The present suits were brought on the 28th October 1892 in the Court of the Munsiff of Bezwada. In them the plaintiff claimed to recover from the defendants balances of rent for their respective holdings, at the determined rates, in respect of the fusli years 1295, 1296, 1297, 1298 and subsequent years.

With the subsequent years this appeal has nothing to do, it is limited to the four years mentioned. The courts in India have held that the claim for rent in respect of those four years is barred by limitation, and the correctness of that ruling is the one question raised in the present appeal.

The rule of limitation applicable to the case is Art. 110 of Schedule II of the Indian Limitation Act (Act XV) of 1877, which prescribes for a suit for arrears of rent a period of limitation of three years reckoned from the time when the arrears become due. The courts in India have held that the period of limitation in this case for the rent of each fusli year runs from the close of that year, and if that view be correct the cases have been rightly decided. The contention before their Lordships was that the period should be counted from the 29th October

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1889, when the decree of the High Court determined the rent payable. And if this contention be correct, these claims were in time.

The point of time from which, under the Limitation Act, the period of limitation is to run is that at which the arrear became due. In most cases no doubt the point of time at which rent becomes due is the close of the period in respect of which it is to be paid. But this is not necessarily always the case in India, and the Limitation Act is an Act for all India.

Legislation, or custom, or express contract, or the special circumstances of any case may make rent become due at a point of time different from the close of the period in respect of which it is to be paid. The case of *Mussumat Ranee Surno Moyee v. Shooshe Mokhe Burmonia* heard before this Board, is an example of a suit for rent, governed by a law of limitation substantially the same as that now before their Lordships, in which the date at which the rent became due was held to be an entirely different date from the close of the period in respect of which that rent was payable. The object of a Limitation Act is presumably to compel people who have actionable claims to sue upon them with due promptitude, or to forfeit the right to do so at all. In such an act the falling due of rent naturally means the falling due of an ascertained rent, which the tenant is under an obligation to pay, and which the landlord can claim and, if necessary, sue for.

In order to see when rent becomes due in a case like the present it is necessary to turn to the Rent Recovery Act (Madras Act VIII of 1865). That Act enacts (section 3) that certain landholders and others shall enter into written engagements with their tenants, to be embodied in pattahs and muchilkas, which (section 4) must contain, amongst other things, the amount and nature of the rent. By section 7 no suit or legal proceedings for rent can be sustained unless pattah and muchilka have been exchanged, or a pattah has been tendered such as the tenant was bound to accept or both parties have agreed to dispense with such documents. If a pattah is tendered and the tenant refuses to accept it, the landholder (section 9) may proceed by summary suit before the Collector to enforce acceptance of the pattah. And in such a suit it is for the Collector to settle the terms of the tenancy, including

the rent, in accordance with the principles laid down in the Act. From the Collector's decision an appeal lies to the Civil Courts (section 69).

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Under this procedure it seems clear that as long as proceedings are pending before the Collector and, on appeal from him before the Civil Courts, the rate of rent is in suspense, for no one can say what it will prove to be, and that therefore no arrear of rent can be said to have become due within the meaning of the Limitation Act. That this is the meaning and effect of the Rent Recovery Act becomes much plainer on a further examination of the Act. The Act (section 87) keeps alive the right to proceed in the Civil Courts in respect of rent; and the present appeal arises out of a civil suit so brought. But the Act deals very briefly with such suits. Its meaning and effect can be better learned from the provisions relating to those special and summary remedies which are dealt with in some detail and fill a large part of the Act. They are available for arrears of rent and must be put in force within one year from the time when the rent became due (section 2). Those special remedies are distress, sale of the holding, ejectment, and arrest. And in each of these cases the proceedings must commence with a document stating the amount of rent due (sections 15, 16, 39, 41, 46).

Their Lordships are of opinion that in the present cases no rent was in arrear or due till the rates of rent were ascertained by the decree of the High Court of 29th October 1899, and that limitation runs from that date.

It may be well to notice two arguments against the view taken by their Lordships, which seem to have had weight with some of the learned Judges in Madras.

Section 14 of the Rent Recovery Act says that "when rent shall remain unpaid at the time when, according to any written agreement or the custom of the country, it ought to have been paid", it is to be "deemed an arrear of rent." It has been said, and no doubt rightly that by the custom of the country agricultural rents are payable at or before the close of the Fasli year. And it has been thought that this section defines the point of time at which agri-

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cultural rent becomes an arrear as the close of the Fasli year. And so it seems to do in the cases to which it applies. But in their Lordships' opinion this whole series of sections applies to ascertained rents, not to rents at rates which have yet to be determined.

Another argument has been based upon section 7 of the Act, already cited. It has been thought that under that section where a land-holder has tendered a pattah which the tenant refuses, but which, as the result of the litigation rendered necessary by that refusal, has been found to have been a proper one, and then proceeds for the rent so ascertained, he may be met by a plea of limitation, on the ground that he might have sued, and ought to have sued, for the rent without waiting to have the rate determined. If that view were correct, it could not affect the present case, for in this case the pattah tendered by the land-holder was not approved by the Courts, but was altered by them. The High Court, however, in the judgment under appeal, has drawn no distinction between the case in which the pattah tendered has been ultimately approved by the Courts and the case in which it has been modified. And their Lordships think the Court was right in so doing. Section 7 is not an enabling section, but a restraining section. In order to see when there is an arrear which can be sued for, it is necessary to examine the Act as a whole; and the reasons have already been stated which lead their Lordships to think that its provisions as to rent due, rent in arrear, and the recovery of rent refer to ascertained rents.

For the foregoing reasons, their Lordships are of opinion that the claims for rents in respect of the years 1295, 1296, 1297 and 1298 are not barred by limitation. They will humbly advise His Majesty that the decrees of the High Court and the District Court ought to be discharged with costs, and those of the Munsif's Court discharged, and that the cases ought to be remitted to the High Court with a declaration to the above effect, in order that they may be disposed of in the Munsif's Court in accordance with that declaration.

The appellant will recover his costs of this appeal from the respondents.

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## JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(FROM THE CALCUTTA HIGH COURT.)

Present :—Lord Macnaghten, Lord Lindley, Sir Andrew Scoble,  
Sir Arthur Wilson, Sir John Bonser.

Sahebzadah Mahomed Zahur-ud-din ... Appellant \*

v.

Sahebzadah Nur-ud-din and others ... Respondents.

*Civil Procedure Code—Review—Notice—Appeal set down for hearing—Appellant not present—Default.*

Zahur-ud-din  
v.  
Nur-ud-din.

Under the Code of Civil Procedure no order of review can be made without previous notice to the person in possession of the decree which is to be reviewed.

It is the duty of a person who has a case in the paper (Notice-board or cause list) to be present prepared to support it by counsel or in person.

Their Lordships' Judgment was delivered by

*Lord Macnaghten* :—Their Lordships have heard this case very fully, and have considered it, and, in their opinion, when the case is understood, there is no difficulty in it whatever.

The appellant comes forward objecting to three orders. One is an order of the High Court granting a Review. In that the learned Counsel for the appellant has shown no valid objection. It was perfectly competent for the High Court to grant a Review in this case. Having granted the Review, and Mr. Bonnerjee's client not being there to oppose it, the Court directed the appeal to be set down for re-hearing in the list of appeals on a certain day. When that day came, the appeal was called on, but the appellant not being there to support it, the High Court ordered the appeal to be dismissed. That order seems to be perfectly right too. If a person sets down an appeal, and does not come forward to support it, the appeal is properly dismissed. The third order of which Mr. Bonnerjee complains is an order by the Chief Justice and his colleagues, refusing to re-instate the appeal on the application of the appellant. Their Lordships have read the judgment of the learned Chief Justice, and they entirely agree with it. It is the duty of a person who has a case in the paper to be present, prepared to support it by counsel or in person. At least three months' notice of this appeal had been given to Mr. Bonnerjee's client. Under the Code of Civil Procedure no order of review can be made



Zahur-ud-din v. Nur-ud-din. without previous notice to the person in possession of the decree which is to be reviewed. The appellant had ample notice in this case. His excuses for not being present are singularly lame. He says he waited in Court till nearly 4 o'clock, and then he went away because he came to the conclusion that the case before him would last the day. That is no reason whatever. The real reason why he was not there was because he could not find the funds, and he had instructed nobody to act on his behalf.

Their Lordships think that this appeal ought to be dismissed, and they will humbly advise His Majesty to that effect.

The respondents not having appeared, there will be no order as to costs.

### THE PRIVY COUNCIL.

(FROM THE CALCUTTA HIGH COURT.)

Present :—Lord Macnaghten, Lord Lindley, Sir Andrew Scoble,  
Sir Arthur Wilson and Sir John Bonser.

Chowdhry Ganesh Dutt Thakoor and others ... Appellants.\*

v.

Mussumat Jewach Thakoorain ... Respondent.

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*Hindu Law—Joint family—Partition—Cesser of Commensality—Circumstances showing separations.*

Cesser of commensality is an element which may properly be considered in determining the question whether there has been a partition of joint family property, but it is not conclusive. *Mussumat Anundee Koomvur v. Khedoo Lal'.*

Separate payment of revenue, separate receipts for rent, adjustment of moneys realized under a decree, purchase of an estate by the members in equal shares, and the fact that one of the members sued as the heir of co-deceased member are circumstances which tend to probabalise the theory of separation.

According to the Mitakshara law in force in Bengal a mother, though not entitled to require a partition so long as her sons remain united, is entitled if a partition takes place between her sons, to receive the share of a son in property which is ancestral or acquired by the employment of ancestral wealth.

But if she acquiesces in the division of the property between her sons without claiming any share for herself, a partition made without allotting a share for her is valid and binding upon her.

Where a partition made without awarding a share to the mother and all the parties are before Court, the Court may declare the partition not binding on her and may award her a share.

*Krishnabai v. Khangowda*\* approved.

There is nothing irregular under S. 44, cl. (a), C. P. C., in seeking to recover in one suit moveable and immoveable property if the cause of action is the same in respect [of both, and the limitation in both cases is the same. *Giyana Sambandha Pandara v. Kandasamy Tambiran* approved.

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A claim by a widow for partition of moveable and immoveable properties in right of her deceased husband upon refusal by the latter's brother is based upon a single cause of action and can be litigated in a single suit.

Their Lordships' Judgment was delivered by

*Lord Macnaghten*:—The suit was brought by the respondent, Jewach Thakoorain, the widow of one Balmukund Thakoor, to determine her rights under a partition of family property which she alleged had taken place in her husband's lifetime, and for such relief as she might be found entitled to under the circumstances of the case. The defendants were the three surviving brothers of her husband, Ganesh Dutt Thakoor, Raja Thakoor and Chhedi Thakoor; Niterbati Thakoorain, the wife of Chhedi Thakoor, in whose name one of the properties alleged to belong to the family had been purchased; and Harakhbati Thakoorain, the mother of the four brothers, who would be entitled to a share on the partition, if proved. All the parties are Brahmins of Tirhoot, and the law which governs the case is the Mitakshara Law, as modified in its application in Bengal.

Chowdhry Raja Thakoor died on the 7th October 1902, and by an order of His Majesty in Council, dated the 28th day of March 1903, Chowdhry Manindra Narayan Thakoor was substituted in his place.

It is common ground that the four brothers, at any rate up to the Fusli year 1290, formed an undivided Hindu family. They were Zemindars, owing considerable interests in land, and in addition carried on a Mahajuni or money-lending business of a profitable character.

The plaintiff's case is that her husband, Balmukund, separated from his brothers in Fusli 1290, that a partition of household goods and zerait lands took place in that year; that a further partition of the Zemindari and Mahajuni properties took place in Fusli 1295; and that Balmukund died while the actual division of these assets was in progress. She further alleges that, after her husband's death, the brothers invited her to the family house, and took advantage of her absence from her own house to demolish it, and possess themselves of the entire family property. Some months

Genesh Dutt later, when she went to visit her father, she discovered what had  
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 as may be supposed, denied by the defendants.

The evidence on both sides is very voluminous, very conflicting, and for the most part unsatisfactory. But both Courts in India concur in finding that Balmukund, in Fusli 1290, built a house for himself and went to live in it with his family. He thus became separate from his brothers in food and residence. This fact lends probability to the evidence that at the same time a partition took place of household furnitures and other moveable property of a similar character.

Cesser of commensality is an element which may properly be considered in determining the question whether there has been a partition of joint family property, but it is not conclusive (*Mussumat Anundee Koonwur v. Khedoo Lal*). It is therefore necessary to consider whether the evidence in other respects supports or negatives the theory that the cesser in this case was adopted with a view to partition in the legal sense of the word.

It is alleged by the plaintiff's witnesses that, at the time Balmukund took up his abode in a separate house, a division of zerait lands was made; and in support of this allegation, Exhibit 16, which purports to be a list of the zerait lands so divided, was produced. This document was discredited by the Subordinate Judge, but accepted by the High Court. In their Lordships' opinion, it is of such doubtful authenticity that they think it safer not to rely on it, at any rate as a correct statement of zerait lands in the possession of the joint family in Fusli 1290.

Five years later, in Fusli 1295, the plaintiff alleges that the Zemindari and mahajuni properties were divided. Here again the evidence is conflicting; but it may be observed that only one of the three surviving brothers was called to support the case put forward on their behalf; that both Courts in India discredited the evidence of Raja Thakoor, the brother who was called; and that two important witnesses Jibi Jha and Rajah Nain, were not examined. Upon the evidence as it stood, the Subordinate Judge found that no partition in Fusli 1295 was proved; while the High Court found that "the separation which had begun in part in 1290 was effectually completed . . . . in 1295, and that "not in respect of some properties only, but in respect of all."

The entire evidence on the record was very minutely dissected by the learned counsel who appeared before their Lordships in this appeal, and in the result they have come to the conclusion that it is not their duty to advise His Majesty that the carefully considered judgment of the High Court upon the main question at issue should be set aside. In coming to this conclusion they have been influenced by the circumstance that there is no dispute as to five facts which, in their opinion, tend to corroborate the story told by the plaintiff's witnesses.

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1. It is admitted that of 65 revenue-paying estates belonging to the family, payment of revenue of 19 was made separately after Fusi 1295, viz., one-fourth in the name of Balmukund, and three-fourths in the name of his three brothers.

2. It is admitted that of a sum of Rs. 35,004 recovered in 1295 under a decree obtained by the family firm against one Gholam Mahomed, three-fourths were credited to the three brothers, and one-fourth to Balmukund.

3. It is admitted that the rent payable by the Attur Indigo Factory to the family under a lease of certain villages, was paid in 1295, as to three-fourths to the three brothers and as to one-fourth to Balmukund, and that after Balmukund's death, one payment of one-fourth of the rent was made to his widow, and then stopped upon an indemnity being given to the Factory by the brothers against any claim that might thereafter be advanced by the widow.

4. It is admitted that in 1295, an estate was purchased out of the family funds in the name of the four brothers, "in equal shares."

5. It is undisputed that in a suit brought to recover a debt due to the family, shortly after Balmukund's death, one of the brothers claimed to sue "as heir and adopted son" of Balmukund, a claim entirely inconsistent with the theory of survivorship in an undivided Hindu family.

These facts give material support to the case made on behalf of the plaintiff, however unconvincing the oral evidence might have been had it stood alone. It was the case of neither party that there was a partial separation, that is, a separation in respect of certain properties only; and their Lordships consequently agree with the finding of the High Court that the plaintiff as heir to Balmukund,

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is entitled to succeed to his share in the family property as it existed at the time of his death, or has been subsequently increased by employment of the family funds.

The amount of this share is the next question to be determined. There is no doubt that, according to the law in force in Bengal, the mother, though not entitled to require a partition so long as her sons remain united, is entitled, if a partition takes place between her sons, to receive the share of a son in property which is ancestral or acquired by the employment of ancestral wealth. She may, of course, acquiesce in the division of the property between her sons without claiming any share for herself; but there is no evidence of any such acquiescence in this case. On the contrary, she claims her share in the written statement which she has filed in this suit, and denies all knowledge of any partition having taken place between her sons. Under these circumstances, the learned Subordinate Judge held that Balmukund's share was one-fifth and not one-fourth. The Judges of the High Court apparently considered that acquiescence on the part of the mother was established, and awarded one-fourth to the plaintiff. But their Lordships have not been referred to, nor have they been able to discover any evidence of acquiescence except a vague statement by the plaintiff that no share was assigned to the mother "because she did not make any objection." Under these circumstances, their Lordships agree with the Subordinate Judge that the mother's claim must be allowed, and the decree of the High Court varied accordingly.

It was contended by Mr. Bonnerjee that the omission to reserve a share for the mother rendered the partition invalid; and in support of this contention he relied on the case of *Krishnabai v. Khangowda* in which it was decided that a partition effected without reserving any share for a minor member of the family, and without the consent of some one authorized to act on his behalf, is invalid as against the minor. So here, their Lordships recognize that the mother is not bound by a partition to which it is not shown she ever assented; and the suit being one for a declaration of rights under the partition, in which all the parties interested are represented, and in which the mother claims her share, their Lordships have felt no difficulty in giving effect to her claim in

the order which they will humbly advise His Majesty to make upon this appeal.

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Mr. Bonnerjee also contended that the suit as framed was not maintainable under the provisions of S. 44, Rule A of the Code of Civil Procedure. The rule is not very happily expressed, but there can be nothing irregular in seeking to recover in one suit moveable and immoveable property, if the cause of action is the same in respect of both. *Giyana Sambandha Pandara v. Kandaswamy Tambiran*'. Here the cause of action arose in the refusal of the three defendants to recognise the right of the widow to succeed to her deceased husband's share in the family property under a partition which had not been completed by actual division at the time of her husband's death; and it would be a denial of justice to hold that in a suit upon such a cause of action relief could not be given in respect of moveable as well as immoveable property. It follows that the claim as regards the moveable property cannot be held to be barred by limitation.

In their Lordships' opinion, the decree of the High Court must be varied so as to include a declaration that the defendant Mussummat Harakhbati Thakoorain is entitled to one-fifth share of the family property and that the respondent Mussummat Jewach Thakoorani is likewise entitled as heir to her husband to one-fifth share in the said property; and subject to this declaration, unless the parties shall come to an equitable arrangement approved by the Court, the suit should be remanded to the Subordinate Judge to inquire what was due to the estate of Chowdhry Balmukund Thakoor in respect of his share at the time of his death, and what have been the subsequent accretions thereto from the employment of the family funds, and for that purpose to take the usual accounts, including the accounts of the family business, and to order that the costs of the enquiry and of taking the accounts and of the partition be paid out of the estate.

Their Lordships will humbly advise His Majesty to make an order remanding the suit to the effect and containing the directions above stated. The appellants Chowdhry Ganesh Dutt Thakoor, Chowdhry Manindra Narayan Thakoor and Chowdhry Chedi Thakoor must pay the respondent's costs of this appeal.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Boddam and Mr. Justice Bhashyam Aiyangar.

Ramasami Chetti and others ... Appellants\* (*Plaintiff and his representatives*).

v.

Alagirisami Chetti and others... Respondents (*Defendants*).

Ramasami Chetti v. Alagirisami Chetti. *Transfer of Property Act, S. 44—Transferee of a portion of the property as opposed to a transferee of a share of the whole—Right to sue for partition—Right of lessee for a term of a share in a village—Order in claim proceedings—Res Judicata—Specification of boundaries sold—Extent not corresponding—Presumption as to area sold.*

A transferee of a portion of the co-tenancy cannot maintain a suit for partition of the portion transferred to him whether for a term or in perpetuity.

*Parbati Churn Deb v. Ain-ud-Deen* referred to.

A transferee of an interest in the share of a co-owner may enforce, under S. 44 of the Transfer of Property Act, a partition of the same so far as it is necessary to give effect to such transfer.

A lessee of a share in a whole village is not a transferee of an interest in a portion of the village and is, therefore, entitled to sue for a partition which is to last during that term.

*Baring v. Nash*<sup>1</sup>; *Heaton v. Drearden*<sup>2</sup> referred to.

Where a claimant does not bring a suit within one year to set aside an adverse order passed against him in the claim proceedings, the order is *res judicata* against the claimant in subsequent proceedings and it is not open to the claimant in such subsequent proceedings to contend that in truth and fact the claimant's interest was not attached.

As a general rule in the absence of anything in the context it must be taken that all the property comprised within the boundaries are offered for sale and purchased if the vendor or judgment-debtor has title to the whole property comprised within the boundaries though the extent specified in the document may not exhaust the area.

If the vendor or judgment-debtor had no title to some part of the area comprised within the boundaries, the conveyance would not of course operate upon such portion and in those circumstances it may also be presumed that all that is offered for sale is the portion to which the vendor or judgment-debtor has title and the extent specified corresponds to such portion.

Second appeal from the decree of the District Court of Madura in A. S. No. 205 of 1900, presented against the decree

\* S. A. No. 893 of 1901.

4th September 1903.

1. I. L. R., 7 C. 577.

3. 16 Beav. 147.

2. 1 Ves and Beam 551.

of the Court of the District Munsif of Tirumangalam in Original Suit No. 168 of 1899.

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Chetti.

*P. R. Sundara Aiyar* for appellants.

*V. Krishnaswami Aiyar* and *K. N. Aiya* for respondents.

The Court delivered the following

**JUDGMENT :—**The appellant sues for a partition of the 100 kulis of punja land mentioned in the plaint and for the recovery of his one-third share therein. The land is situated in the Inam village of Attukkulam, which originally belonged in equal moieties to two brothers,—the great-grandfather of the 10th defendant and the great-grandfather of Lakshmana Iyer, on whose death his half share devolved on his daughter, the 2nd defendant. The half share of the great-grandfather of the 10th defendant devolved, share and share alike, upon the 10th defendant, his brother one Peria Lakshmana Iyer, and his brother's son, the 9th defendant. The village was thus in the possession of the 2nd, the 9th and the 10th defendants and one Peria Lakshmana Iyer, as tenants in common, the 2nd defendant's share being one half and those of the 9th and 10th defendants and Peria Lakshmana Iyer being one-sixth each. These persons originally had only the melvaram right in the 100 kulis of land in question, the right of occupancy or kudivaram right being with certain ryots, who subsequently, from time to time, relinquished their rights of occupancy prior to 1883 and thus these defendants and Peria Lakshmana Iyer became the full owners of the 100 kulis, i. e., of both the varams therein. One Nagalusami Chetti obtained a decree against the 10th defendant in Original Suit No. 215 of 1887 and in execution thereof, he, on the 30th October 1888, attached (Exhibit VI) the 10th defendant's share and interest in the village, describing the same under two items, the first item as the one-sixth share belonging to the defendant in the village (the extent being 100 cawnies of nanja and 900 kulis of punja) and the second item as the right to both the varams in the 100 kulis of punja (now in question), a note being added that the defendants' entire right and interest in the properties were attached. The boundaries given in respect of the first item are apparently the boundaries of the whole village (thus including the 100 kulis forming the second item). The boundaries



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given in respect of the second item are apparently the boundaries of the 100 kulis alone. The second item was sold on the 5th February 1889 and purchased for Rs. 102 by the 1st defendant (in this suit), the sale being confirmed (*vide* Exhibit XIII) on the 10th April 1889. The first item, or rather one-half of the first item, *i. e.*, half of one-sixth share belonging to the 10th defendant, was sold on the 1st April 1889 and purchased by the decree-holder, Nagulusami Chetti, for Rs. 75, the sale being confirmed on the 18th June 1889 (Exhibit A). The same Nagulusami Chetti obtained a decree against the widow and legal representative of Peria Lakshmana Iyer (aforesaid) the owner of an one-sixth share and in execution thereof brought to sale and purchased for Rs. 75, on the 1st July 1889, the one-sixth share in the village, belonging to the judgment-debtor (Exhibit B), the sale being confirmed on the 2nd September 1889. The description, extent and boundaries of the property are substantially the same as in Exhibit A. The same Nagulusami Chetti obtained a decree against the 9th defendant and in execution thereof attached (Exhibit L) his one-sixth share in the village, the description, extent and boundaries of the property being substantially the same as in Exhibits A and B. The decree-holder himself became the purchaser (for Rs. 125) on the 14th April 1891, the sale being confirmed on the 29th June 1891 (*vide* Exhibit C). The description of the property in Exhibit C is identical with that in Exhibit L. Both in L and in C, reference is made to the defendant's one-sixth share in the 'beasts, trees, tittu, tidal, tank, bund, &c.' and in this respect they differ from Exhibits A, B and XIII. While the 9th defendant's share was under attachment, the 1st defendant, on the 10th March 1891, preferred a claim under S. 278, Civil Procedure Code, stating that he had become the purchaser of the 100 kulis of punja (now in question) in execution of the decree in Original Suit No. 215 of 1887 (already referred to), that the 9th defendant had no manner of right or enjoyment therein, that Nagulusami Chetti, the plaintiff, had fraudulently included the same in the attachment and that it should be released therefrom (*vide* Exhibit O). The District Munsif fixed the 13th April 1891 to enable the parties to adduce evidence in regard to the claim petition, and, on the 14th April, he held that the evidence clearly established that the 10th defendant, the defendant in Original Suit No. 215 of 1887, had only a

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sixth share in the 100 kulis and dismissing the claim preferred by the 1st defendant, ordered that the 9th defendant's one-sixth interest in the 100 kulis should also be sold; and on the same day, the one-sixth share of the 9th defendant in the village was sold and purchased by Nagulusami himself. After this sale, if, as alleged by the plaintiff, the 10th defendant had only a sixth share in the 100 kulis in question (as in the remaining portion of the village) and under Exhibits B and C, Nagulusami became the purchaser of the one-sixth share of Peria Lakshmana Iyer and of the one-sixth share of the 9th defendant, in the whole village including the 100 kulis in question, the position of the various parties concerned in the village would be as follows:—The second defendant would continue to possess one-half share in the whole village: Nagulusami would be the owner of one-third share in the whole village and of a further one-twelfth share thereof exclusive of the 100 kulis in question; the 10th defendant would be the owner of the remaining one-twelfth share of the whole village exclusive of the 100 kulis in question, while the 1st defendant would have a sixth share in the 100 kulis in question.

If, however, as alleged by the 1st defendant, the 10th defendant was the separate and exclusive owner of the 100 kulis in question, the position would be as follows:—The 1st defendant would have the sole and exclusive ownership of the 100 kulis and the rest of the village alone would be owned by the 2nd defendant, Nagulusami Chetti and the 10th defendant as tenants in common, their shares, being respectively one-half, five-twelfths and one-twelfth.

Nagulusami Chetti sold the entire interest acquired by him in the village, under Exhibits A, B and C, to one Alagappa Chetti, on the 11th May 1894, for Rs. 500 (Exhibit D), and the latter sold the same in equal moieties to the 10th and 9th defendants on the 11th October 1897 (Exhibits E and F) for Rs. 540 each. The 9th defendant thus became the owner of five twenty-fourths, and the 10th defendant the owner of seven twenty-fourths (five twenty-fourths *plus* a twelfth). Whether such ownership extended over the entire village including the 100 kulis in question or only over the rest of the village (excluding the 100 kulis) will be considered later on.

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The plaintiff obtained a lease (Exhibit G, dated the 21st September 1897) from the 2nd defendant of her one-half share in the entire village (exclusive of the 100 kulis in question, or, at any rate, of the kudivaram right therein), for a term of 23 years in consideration of the payment of a premium of Rs. 1,960. It is perfectly clear from this document that the 2nd defendant did not reserve anything but the 100 kulis in question and that the waste lands in the village referred to by the Courts below as 250 kulis were included in the lease (*vide* para. 4). About the same time (on the 14th October 1897) the plaintiff obtained a similar lease (Exhibit H) from defendants 9 and 10 of their interest (amounting together to one-half share) in the village, without any reservation, for the same term of 23 years, on payment of a premium of Rupees 1,950. Exhibits G and H have both been registered and the plaintiff's case in the present suit is that, by virtue of Exhibits G and H; he has acquired a right to the exclusive possession for 23 years of the entire village exclusive of the 100 kulis in question, and that in respect of the latter he is entitled to joint possession for the same period, with the 1st and 2nd defendants, the shares of the three being respectively one-third, one-sixth and one-half, and that, as he does not like such joint possession, he desires a partition of his one-third share.

Among others, the principal issues framed in the case were:— Whether the 100 kulis in question became the exclusive property of the 10th defendant or continued to be the joint property of the co-sharers (issue No. 3); whether the plaintiff is estopped by the conduct of Nagulusami Chetti from denying the 1st defendant's exclusive title to the 100 kulis in question (issue No. 2); whether the plaintiff is entitled to maintain a suit for the partition of the plaintiff 100 kulis alone (5th issue); whether the 1st defendant is concluded by the order of the District Munsif (Exhibit O) passed in Original Suit No. 23 of 1890 (in which Nagulusami Chetti was the decree-holder) dismissing his claim petition, from claiming the one-sixth share in the 100 kulis in question, which was therein attached as the property of the 9th defendant, the judgment-debtor therein (issue No. 7).

The District Munsif found that the 10th defendant owned and enjoyed the 100 kulis as his exclusive property, that the plaintiff,

who derives his interest in the plaint land from defendants 9 and 10, who in their turn derived their title from Nagulusami Chetti, is estopped from disputing the exclusive title of the 1st defendant, and that the plaintiff's claim is a claim for a partial partition and as such is not maintainable. He accordingly dismissed the plaintiff's suit without recording any finding on issue No. 7. The District Judge, on appeal, concurring with the District Munsif that the suit was one for a partial partition and that the plaintiff was estopped from denying the 1st defendant's exclusive title to the land, confirmed the decree of the District Munsif dismissing the suit, and expressly refrained from considering and deciding the 3rd issue, viz., whether the plaint land was the exclusive property of the 10th defendant, though, from the tenor of certain observations made by him in paragraph 4 of his judgment, he seems to have been inclined to take the same view of the District Munsif on that question also. It is to be regretted that in a complicated case of this sort, the Lower Appellate Court should not have considered and recorded its finding on this important issue which would go to the root of the plaintiff's case *on the merits*.

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In support of this second appeal the pleader for the appellant contends that this cannot be regarded as a suit for partial partition inasmuch as upon his own case he is not entitled to any partition of the rest of the village to which by virtue of Exhibits G and H he became entitled to exclusive possession for the term of 23 years and that the only portion of which he can demand a partition is the 100 kulis in question to which he is entitled to possession only jointly with the 1st and 2nd defendants and that though he is only a lessee for a term of years of the interest of the 9th and 10th defendants, he is entitled to demand a partition. In our opinion this contention is well-founded, though the partition which he seeks to enforce can last only for the period of his lease. It is no doubt the law that the transferee from one or more co-sharers of a portion only of the co-tenancy cannot maintain a suit for partition of the portion transferred to him, whether for a term or in perpetuity (*Parbati Churn Deb v. Ain-ud-deen*<sup>1</sup>) but in this case, the plaintiff is, so far as any rate as the one-sixth share of the 9th defendant is concerned, a lessee of that one-sixth interest in the whole of the village: and

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1. I. L. R., 7 C. 577.

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so far as that right is concerned he is not transferee of an interest in a portion of the village and though he has acquired only a limited term in such interest, we hold that it is competent to him to bring a suit for partition which is to last during that term (*Baring v. Nash*<sup>1</sup> and *Heaton v. Dearden*.<sup>2</sup> See also 1 Washburn's Real Property, pp. 713, 715 and Freeman on Co-tenancy, paragraphs 485, 440 and 421. In our opinion Section 44 of the Transfer of Property Act adopts the same principle and provides that the transferee of an interest in the share of a co-owner may enforce a partition of the same so far as is necessary to give effect to such transfer. And the suit cannot be regarded as a suit for partial partition, inasmuch as the plaintiff cannot include in his claim for partition the remainder of the village of which he already has the exclusive possession under Exhibits G and H with the consent of the 2nd, 9th and 10th defendants who alone have any interest therein. We cannot accede to the contention made on behalf of the respondent that the plaintiff is not entitled to the exclusive possession of the remaining portion of the village, inasmuch as the lease of the share of the 2nd defendant reserving a right in the 100 kulis in question will give him no right whatever. The plaintiff after obtaining a lease of the 21st September 1897 (Exhibit G) from the 2nd defendant of the rest of the village, obtained a lease on the 14th October 1897 (Exhibit H) from the 9th and 10th defendants of their interest in the rest of the village and of their alleged interest in the 100 kulis also. In the very passage in Washburn's Real Property, pp. 687 and 688, relied on by the learned pleader for the respondent, it is laid down that "where one has conveyed a specific part of an estate of which he is tenant in common with others, the conveyance may be made good by the other co-tenants releasing to him their interest in such portion." Even assuming, for the sake of argument, that Exhibit G, if it stood alone, would be inefficacious to give any right to the plaintiff, the subsequent lease, Exhibit H, obtained by the plaintiff from the other co-tenants, the 9th and 10th defendants, would operate as a release to him of their interest in the remainder of the village and thus make good the lease given by the 2nd defendant. The plaintiff, therefore, has a valid title to the possession of the remainder of the village for the term of 23 years with the consent

1. 1 Ves and Beames, 551.

2. 16 Beav. 147.

of all the co-tenants. As, therefore, he cannot demand a partition of that, he has rightly brought his suit for the partition of the 100 kulis alone in which he admits that the 1st and 2nd defendants are jointly entitled to possession with him. In this view the cases relied on in the Courts below *Parbuti Churn Deb v. Ain-ud-deen*<sup>1</sup> and *Koer Hasmat Rai v. Sunder Das*<sup>2</sup>, are inapplicable.

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The next contention raised by the appellant's pleader is in respect of the 7th issue which has not been considered by either of the Courts below, and we think his contention is well-founded that in any view of the case the plaintiff tracing his title to Nagulusami Chetti has acquired a valid title to the one-sixth share of the 9th defendant in the 100 kulis. Nagulusami as decree-holder in Original Suit No. 23 of 1890 against the 9th defendant attached his one-sixth share in the village under Exhibit L, and the 1st defendant who already had purchased the right, title and interest of the 10th defendant in the 100 kulis in question preferred a claim on the ground that the 9th defendant had no interest therein and prayed that the same should be released from attachment. It is clear from Exhibit O that Nagulusami opposed this claim and after investigation the District Munsif dismissed the claim and upheld the attachment and directed the sale of the 9th defendant's one-sixth share in the 100 kulis as well as in the rest of the village. It is clear from the description of property in Exhibit C that all the property attached under L was sold and bought by Nagulusami himself. The 1st defendant, the claimant, did not bring a suit to establish his right under S. 283 of the Code within one year and the order of the Munsif, therefore, has become conclusive and operates as *res judicata* so far as the one-sixth share disallowed to him. When both the claimant and the decree-holder proceeded on the footing that the 9th defendant's interest in the 100 kulis also was the subject of attachment and the order of the Court was passed on that basis, it is impossible to accept the contention, on the part of the respondent, that in truth and fact the 100 kulis were not attached and that the order of the Munsif was one passed without jurisdiction and is inoperative. Even assuming that Nagulusami was, previously to the passing of the order (Exhibit O), estopped under S. 115 of the Indian Evidence Act from disputing the 1st defendant's exclusive

1. I. L. R., 7 C. 577.

2. I. L. R., 11 C. 396.

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title to the 100 kulis in question, the later estoppel by record created by Exhibit O, so far as the one-sixth share of the 100 kulis is concerned, must prevail in favour of Nagulusami and therefore of the plaintiff as his representative in interest. The plaintiff is, therefore, entitled to the partition of the one-sixth share in the 100 kulis.

As regards the remaining one-sixth share also it is contended by the appellant that if the 10th defendant was not exclusively entitled to the 100 kulis the finding of the Courts below that Nagulusami, and, therefore, the plaintiff are estopped from disputing the 1st defendant's title to it, is not sustainable in law. The argument on this point is two-fold :—First, that Nagulusami himself was not estopped but that even if he was so estopped he, the plaintiff, is not estopped, as he is in a position to trace his title to the one-sixth to Peria Lakshmaniah.

The plea of estoppel can be founded only upon any representation made by Nagulusami either by words or by conduct before the 1st defendant became purchaser of the 100 kulis under Exhibit XIII on the 5th February 1889. The only piece of evidence upon which reliance is placed is Exhibit VI, the attachment list, in O. S. No. 215 of 1886 already referred to. This of course cannot be presumed to have come to the notice of intending purchasers and if the proclamation of the sale which must have preceded the sale and was notice of the sale to intending purchasers, was in the same terms as Exhibit VI, that would be a legal basis to found the plea of estoppel upon—and if the sale of both the items took place upon the same day, it may be reasonably presumed that there was a common proclamation under which both the lots were sold and that the description of the two lots as therein given would have been the same as in Exhibit VI; but it is clear from Exhibits XIII and A that the sale of the two lots took place on different dates and were confirmed on different dates. Nothing, therefore, can be presumed as to the contents of the proclamation from Exhibit VI and unless the two items were described in one and the same proclamation as they are described in Exhibit VI, it would be impossible to hold that there was any representation by Nagulusami, the attaching creditor, to intending purchasers that the right, title and the interest of the judgment-creditor

was not restricted to the one-sixth share in the 100 kulis as it was expressly so restricted in the rest of the property. The proclamation or proclamations under which the sales took place have not been filed nor has secondary evidence of their contents been given and, therefore, we are compelled to hold that there is no legal evidence upon which a finding of estoppel could be sustained or based.

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The appellant's pleader also argues that even if Nagulusami were estopped, Peria Lakshmaniah, the owner of the one-sixth, would not be estopped, and as he died without issue, leaving a widow Venkata Lakshmi Ammal and she has died, the 9th and 10th defendants have become entitled to that one-sixth share as the next reversionary heirs of parallel grade and that, therefore, the plaintiff can trace his claim to that one-sixth share to the 9th and 10th defendants and that the mere fact that the 9th and 10th defendants recited in Exhibit H, the lease executed by them in favour of the plaintiff, that they derived their title to that one-sixth from Nagulusami would not derogate from the plaintiff's title to the one-sixth if he could show that in truth and law the 9th and 10th defendants were entitled to it as the heirs of Peria Lakshmaniah and not under Nagulusami. This position would no doubt be sound if they were such heirs, a point on which there is no finding by either of the lower Courts; but as we cannot accept the finding of the Courts below on the plea of estoppel, it becomes unnecessary to call for a finding on this point. But, if Peria Lakshmaniah was not entitled to one-sixth share in the 100 kulis and the same belonged exclusively to the 10th defendant, neither could Nagulusami have obtained a title to it under the sale certificate Exhibit B, nor could the 9th and 10th defendants have inherited it from Peria Lakshmaniah. We must, therefore, call upon the District Judge to return a finding upon the 3rd issue before we can dispose of this second appeal. The respondent's pleader addressed us at considerable length contending that Exhibits B, C and L must be construed as relating only to the village exclusive of the 100 kulis in question and not as inclusive thereof; but the position of affairs is that the documents purport to give the boundaries of the properties attached and sold and undoubtedly the 100 kulis in question are comprised within the boundaries given, but the extent specified in the document is,



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however, less by 100 kulis than the total area within these boundaries and the documents also purport to be a sale or attachment of a share in the village. As a general rule, in the absence of anything in the context (as in Exhibit VI) leading to a contrary inference, it must be taken that all the property comprised within the boundaries are offered for sale and purchased, if the vendor or judgment-debtor has title to the whole property comprised within the boundary though the extent specified in the document may not exhaust the area. If the vendor or judgment-debtor had no title to some part of the area comprised within the boundaries, the conveyance would not of course operate upon such portion and in those circumstances it may also be presumed that all that is offered for sale is the portion to which the vendor or judgment-debtor has title and the extent specified corresponds to such portion. If the Munsif's finding on the 3rd issue is also upheld by the District Judge (and in the determination of that issue the extent of the dry land as mentioned in Exhibits A, B, C and similar documents will be relevant as a piece of evidence to be taken into consideration) it will follow that no interest in the 100 kulis could have passed to Nagulusami as purchaser, but if the 100 kulis were not the exclusive property of the 10th defendant but belonged in shares to the tenants in common, the description of the property sold as given in the above document is sufficient to transfer to Nagulusami the interest of the judgment-debtors under the two decrees to which Exhibits B and C relate.

The 10th and 11th issues relating respectively to the claim made by the 1st defendant for compensation for improvements made by him on the 100 kulis and the claim made by the plaintiff for past mesne profits have not been argued before us. The District Judge should, therefore, submit his findings upon these two issues as well as upon the 3rd issue upon the evidence already on record within two months from this date. Seven days will be allowed for filing objections.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Ismail Kani Rowthan ... Appellant\* (1st Defendant).

v.

Nazarali Sahib and another ... Respondents } (Plaintiff and  
2nd Defendant).

*Landlord and tenant—Tenant erecting buildings not for agricultural purposes—Tenant's only right to demolish and remove building materials during continuance of lease—Tenant's right after termination—Option of Landlord—Transfer of property Act, Ss. 51 and 108—Law prior to Transfer of Property Act—Hindu and Mahomedan Laws on the subject.*

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Where under a lease it is provided that the tenant will remove at the end of the term the superstructure he may build upon the land and vacate the site, the tenant cannot claim any compensation from the landlord.

Even before the Transfer of Property Act, it has long been judicially settled that the maxim of the English Law "*Quicquid in edificatur solo solo cedit*" does not generally apply here.

*Thakoor Chunder Paramanick*, B. L. R. (F. B.) Supp. Vol. 597, followed.

The law upon this subject prior to the Transfer of Property Act was not the Hindu and Mahomedan Laws as such as under S. 16 of the Madras Civil Courts Act those laws were not strictly applicable to cases arising from contract. But Hindu Law was applied in the absence of any special usage or custom as a rule of justice, equity and good conscience.

According to the Hindu Law if a man should build a house on the ground of a stranger and live in it paying for it, he might remove the building materials when he should leave the house and not claim any compensation, but if he should be a trespasser, and build on the land without the owner's wish he could not remove the building materials.

According to the Mahomedan Law even a trespasser would be entitled to remove the building materials when he should be directed to restore the land to the owner and he would not be entitled to claim compensation. But if removal be injurious to the land, the owner would have the option of paying compensation equal to the value of the materials of the building if it were demolished.

*Secretary of State for Foreign affairs v. Charlesworth Pilling and Co.*, referred to.

The rules laid down by the Transfer of Property Act substantially re-produce the law as it stood before the Act.

Under S. 108 of the Transfer of Property Act the lessee must not, in the absence of a contract of local usage to the contrary, erect without the lessor's consent on

\* S. A. No. 66 of 1902.

23rd September 1903.

1. I. L. R. 26 B. 1.

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the property demised any permanent superstructure except for agricultural purposes and the lessee may remove at any time *during the continuance of the lease* all things attached to the earth and must restore the land to the lessor on the determination of the lease in the state in which it was at the time of the letting.

Where the tenant has not removed the materials during the continuance of the tenancy, the ordinary or common law of the country is that the lessor has the option either to take the building on paying compensation or if he is unwilling to pay compensation to allow the tenant to remove the building.

The measure of compensation, if the lessor exercises the option of taking the building is, according to the Mahomedan Law as laid down in the Hedaya, the value of the materials after the building is demolished.

*Obiter* :—Where a person believes in good faith that he had in the property the absolute interest of a permanent lessee and in such faith erected a permanent building on the site he would be entitled to claim compensation if it should be ultimately held that he had no permanent interest and must surrender the land upon the principle recognised in S. 51 of the Transfer of Property Act.

From the fact that the lease expressly permits the tenant to erect permanent building it cannot be implied as one of the terms of the contract of letting that the lessor will not exercise his right of ejectment without paying compensation for the buildings erected by the tenant.

Decision of *Innes, J.*, in *Mahalatchmi Ammal v. Palani Chetti*<sup>1</sup>, dissented from.

The only difference between letting land without permission—either express or implied—to erect buildings thereon and letting the same with such permission is that in the former case the lessee cannot under Cl. (p) of S. 108 of the T. P. Act erect any permanent buildings on the land (except for agricultural purposes) and if he does, a suit for a mandatory injunction for the removal of the building even during the term of the lease will lie.

*Ramanadhan v. Zamindar of Ramnad*<sup>2</sup>, referred to.

Second appeal from the decree of the Subordinate Judge's Court of Kumbakonam in A. S. No. 1075 of 1900, presented against the decree of the Court of the District Munsif of Tiruvalur in O. S. No. 205 of 1899.

*P. R. Sundara Aiyar* for appellant.

*P. S. Sivaswami Aiyar* for respondent.

The Court delivered the following

JUDGMENT :—*Bhashyam Aiyangar, J.*—The only ground urged and argued in this appeal is that the decree appealed against should have provided for payment to the appellant of compensation, before he is evicted from plots A, B and C,

the measure of compensation being the present market value of the buildings erected' thereon by him, after he had taken a lease of plots A and B in 1875 for a term of 20 years, and of plot C in 1887 for a term of 3 years. In Exhibits B and C—counterparts of the leases relating to plots A and B—it is expressly stated that the appellant took a lease of the lands for constructing a building thereon for carrying on trade, and in Exhibit D, which relates to plot C, it is provided that the appellant, who was then erecting a thatched house on the plot, would remove the same and vacate the site in case the lessor (1st respondent's father) wanted it to construct a building thereon, for the Thaikkal to which the plots belonged.

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In regard to plot C, no question of compensation therefore arises and the appeal so far as it relates to that plot is clearly unsustainable, firstly, because the 1st respondent prior to the institution of this suit did give notice to quit (Exhibit E), expressly stating therein that the land was required for erecting a building thereon for the Thaikkal and, secondly, because, according to the proper construction of Exhibit D, the condition relating to the site being required for the erection of a building thereon for the Thaikkal, was to apply only if the lessee was to be required to give up the site during the 3 years' term of the lease.

As regards the buildings erected on plots A and B, it is not contended that they are of kind different from or of a value out of proportion to what was in the contemplation of the parties when the transaction of lease was entered into. Nor has any claim been made on behalf of the 1st respondent that the appellant is no longer at liberty to remove the buildings as he has not done so before the expiration of the term of the lease in 1895, or that, at any rate, at the option of the 1st respondent, the appellant must leave the building as it is, on payment to him of compensation for his right to remove the building, the measure of such compensation being the value, not of the building as it is, but of the materials (after the building should be demolished).

The only question, therefore, for determination in this appeal, is whether the appellant can insist upon being paid the value of the house before he is ejected; and as the two leases—Exhibits B and

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C—were taken before the passing of the Transfer of Property Act the question has to be determined with reference to the law as it obtained here before the Transfer of Property Act. It has long been judicially settled in this country (see the case of *Thakoor Chunder Paramanick*<sup>1</sup> that the maxim of the English Law '*Quicquid inaedificatur solo solo cedit*' does not generally apply here; and even in cases to which the English Law as such was applicable, the Indian Legislature by Act XI of 1855 has departed from the above maxim in the cases specified in S. 2 of the Act (corresponding to S. 51 of the Transfer of Property Act). So far as cases arising in the mofussil are concerned, the Hindu or the Muhammadan Law as such is not strictly applicable to cases arising from contracts (*vide* S. 16 of the Madras Civil Courts Act) and such cases must be governed by the rule of 'justice, equity and good conscience' based upon the customary law of the land which, in the absence of proof of any special usage or custom, will be presumed to be in accordance with the texts of the Hindu or Muhammadan law as the case may be.

The Hindu and the Muhammadan law bearing upon the subject in question (in this appeal) was examined by a Full Bench of the Calcutta High Court in the case of *Thakoor Chunder Paramanick*<sup>1</sup> and Sir Barnes Peacock, in delivering the judgment of the Full Bench, laid down the common law of the land as follows :—

" We think it clear that, according to the usages and customs of the country, buildings and other such improvements made on land do not, by the mere accident of their attachment to the soil, become the property of the owner of the soil; and we think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any *bona fide* title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil, the option of taking the building or allowing the removal of the material remaining with the owner of the land in those cases in which the building is not taken down by the builder

1. B. L. R. Sup. Vol. 595, 597.

during the continuance of any estate he may possess—" (at page 598).

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The leading authority on the subject in the Hindu law is the following text of Narada (chapter VI, verses 20, 21—Sacred Books of the East, Volume 33, pages 143, 144):—" (20). If a man has built a house on the ground of a stranger and lives in it, paying rent for it, he may take with him when he leaves the house, the thatch, the timber, the bricks and other building materials. (21) But if he has been residing on the ground of a stranger, without paying rent and against that man's wish, he shall by no means take with him on leaving it, the thatch and the timber".

It may be noted in passing that the first of the above two texts is directly applicable to the present case, and by providing that the tenant may remove the materials of the house negatives by implication the right of the tenant to demand compensation. The latter text—which is applicable to the case of a trespasser building on the land of another against that man's wish—is in accordance with the maxim of the English law.

The Muhammadan law on the subject had recently to be considered and applied by the Judicial Committee of the Privy Council in a case on appeal from His Majesty's Court for Zanzibar in *Secretary of State for Foreign Affairs v. Charlesworth Pilling & Co.*, In that case the respondents, an English Company, were owners of certain lands which they had purchased from the natives. The land was required by the British Government for the construction of a railway and was taken possession of and buildings erected thereon in anticipation of the Indian Land Acquisition Act being extended to Zanzibar by an order in Council and the land being duly acquired thereunder. Accordingly when the notification under S. 6 of the Act was duly published, the buildings had been erected on the land. Under S. 23 of the Act, the company were entitled to compensation according to the market value of the land as it was at the time of the publication of the declaration under S. 6. The respondents contending that according to the maxim of the English law (already noticed) they had become the owners of the buildings erected on their land (as they stood at the date of the publication of the declaration up to which date

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their ownership in the land continued) claimed compensation for the land with the buildings thereon. Their Lordships of the Privy Council held that the English law 'recognises the principle that the incidents of land are governed by the law of its site' and that this being the Muhammadan law in Zanzibar, the case was governed by the Muhammadan law. Following the text of the Hedaya:—"If a person usurp land and plant trees in it or erect a building upon it, he must in that case be directed to remove the trees and clear the land and to restore it to the proprietor. If removal.....be injurious to the land, the proprietor of the land has the option of paying to the proprietor of the trees or the building a compensation equal to their value and thus possessing himself of them; because in this case, there is an advantage to both and the injury to both is obviated" (Hamilton's 'Translation, Vol. III, Book 37—p. 539)—they held that the respondent Company had not become the owners of the buildings on their land at the date of the publication of the notice (under S. 6 of the Land Acquisition Act). Their Lordships then point out that according to the Hedaya the compensation to which the person who erected the building would be entitled is only the value of the materials of the building (after it is demolished), because he is not at liberty to have the building on the ground but only to remove and carry away the materials.

Thus both under the Hindu and the Muhammadan law—and it may here be observed that the parties to the present suit are Muhammadans—and the common law of the land (as laid down by the Full Bench of the Calcutta High Court in *Paramonick's case*<sup>1</sup>) a tenant who erects a building on land let to him can only remove the same and not claim compensation for it on eviction by the landlord.

When the Transfer of Property Act was enacted, this rule was adopted by the Legislature in S. 108 (h). The section provides, *inter alia*, that in the absence of a contract or local usage to the contrary, the lessee must not without the lessor's consent erect on the property (leased) any permanent structure (except for agricultural purposes) (cl. p.), that the lessee may remove at any time during the continuance of the lease all things which he has attached to the earth (cl. h and *vide* definition of 'attached to the earth' in

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1. B. L. R. Sup. Vol. 595.

S. 3) and that on the determination of the lease the lessee is bound to put the lessor into possession of the property in as good a condition as it was in at the time when he was put in possession [cl. (q) and (m)]. It will thus be seen that the prohibition in (cl. p) against the construction of permanent structures on the land (except for agricultural purposes) does not apply when, according to the contract of the parties, the land is let for the erection of a dwelling house or shop thereon (as in the present case) and that under cl. (p) buildings erected on the land by the lessee may be removed during the term of the lease and that under cl. (q) and (m) the lessee should, on the determination of the lease, restore the land to the lessor in the state in which it was at the time of the letting. Even if the building erected on the land demised be one contemplated and sanctioned by the lease, the above provisions will be applicable thereto unless there is a contract or local usage to the contrary—(such as) that the lessee shall, on eviction, be entitled to compensation for the building or that he shall with or without compensation, restore the land let to him with the buildings that he may have erected thereon during the continuance of the lease.

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The rules laid down by the Transfer of Property Act thus substantially reproduce the law as it stood before the Act. It is, however, noteworthy that cl. (h) (of S. 108) only provides for the tenant removing, 'during the continuance of the lease,' all things which he may have attached to the land, and nothing is said as to the rights of the parties in respect of such things after the determination of the lease, if they have not been already removed by the tenant. The question may arise whether the tenant forfeits all his rights in such things if he has not so removed them ; and in the absence of any contract on that point, the question will have to be solved with reference to 'local usage,' whatever may be the precise sense in which that expression is used in S. 108. According to the customary or common law of the land, as laid down in *Paramanick's case*<sup>1</sup>, the option in such cases will be with the lessor either to take the building on paying compensation, or, if he is unwilling to pay compensation, to allow the tenant to remove the building—the measure of compensation (in the former case), according to the Muhammadan law as laid down in the *Hedaya*, being the value of



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the materials (after the building is demolished)—a juristic principle as logical and refined as, in the great majority of cases, it is advantageous to both parties by obviating injury to either and at the same time preserving the building. As already observed, the 1st respondent in the present case, however, allows the appellant to remove the building.

The preponderance of case law on the subject is also decidedly against the appellant's contention. In a case arising in Calcutta between landlord and tenant (*Parbutty Bewah v. Womatarā Dābee*<sup>1</sup>) it was held that the custom was for tenants to remove the structures erected by them and that such custom had its origin in the Hindu and the Muhammadan laws as explained in *Paramanick's* case. In *Russick Loll Mudduck v. Lokenath Kurmoker*<sup>2</sup> Wilson, J., held that the relation between landlord and tenant (in the Presidency Town of Calcutta) being one of 'contract and dealing between party and party' within the meaning of section 17 of 21 Geo. III, c. 70, was governed by the Hindu or the Muhammadan law, as the case may be—the Indian Contract Act not being inconsistent with it in this respect—and that the ruling of the Full Bench in *Paramanick's* case as to the removal of the buildings erected by the tenant was applicable to Calcutta. In *Juggut Mohinee Dossee v. Dwarka Nuth Bysack*<sup>3</sup>, however, Garth C. J. and Pantisfz, J., while holding that the ruling in *Paramanick's* case would be applicable to Calcutta in cases arising between landlord and tenant, held that in cases arising in Calcutta between an owner of land and a trespasser erecting buildings upon it, the High Court was bound by the express language of the charter to administer the law of 'equity and good conscience' as administered by the Supreme Court, which generally speaking was 'the self-same law of equity administered in the English Courts of Equity' and that therefore, the building became the property of the owner of the land. The ruling in *Paramanick's* case has been approved by the Calcutta High Court in a recent decision in *Ismail Khan Muhomed v. Jaigun Bibi*<sup>4</sup>.

In *Shaik Husain v. Govardhāndas Paramanandas*<sup>5</sup> it was held in the case of a yearly tenancy (in the town of Bombay) that there

1. 14 B. L. R., 201.

2. I. L. R., 5 C. 688.

3. I. L. R., 8 C. 590.

4. I. L. R., 27 C. 570 at 596.

5. I. L. R. 20 B. 1.

was "no authority for holding that a tenant who erects buildings on a demised land is entitled to compensation on being evicted on the termination of his tenancy" and that such claim for compensation is impliedly negatived by his right to remove such buildings—a right not only established by judicial decisions but also now enacted by the Legislature in section 108(h) of the Transfer of Property Act. It would seem that in this case also, as in the present case, the land was demised for building purposes. In *Beni Ram v. Kundan Lal*<sup>1</sup>, there was a lease, given in 1858, of six bighas of land for a term of years (ending with the then current revenue settlement of the mouzah in which the land leased was situate), for the construction thereon of a saltpetre factory. During the term of the lease, the tenant, after the completion of the factory, and, in fact, after it had ceased to exist, erected houses on the land, at a considerable cost, with the knowledge of and without any interference or objection on the part of the landlord. A suit in ejectment brought after the termination of the lease was dismissed by the Indian Courts (including the High Court on second appeal) on the ground that the landlord stood by and acquiesced in the erection of the permanent structures. On appeal (by special leave) their Lordships of the Privy Council, in reversing the decrees of the Courts below and passing a decree in ejectment, with liberty to the tenant to remove the houses built on the land, observed that "in order to raise the equitable estoppel which was enforced against the appellants by both the Appellate Courts below, it was incumbent upon the respondents to show that the conduct of the owner, whether consisting in abstinence from interfering, or in active intervention, was sufficient to justify the legal inference that they had, by plain implication, contracted that the right of tenancy under which the lessees originally obtained possession of the land should be changed into a perpetual right of occupation" (at p. 502). They further draw attention, to the fact that the maxim of the English law '*Quicquid in aedificatur solo solo cedit*' has no application in India and that the established rule is that the lessee may remove at any time during the continuance of the lease all things which he has attached to the earth, provided he leaves the property in the state in which he received it'; implying thereby that there is thus in India even less reason than in England,

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for raising a plea of equitable estoppel against the landlord in the case of a lease for a term of years. In *Venkatavaragappa v. Tirumalai*<sup>1</sup> it was held that where a tenant from year to year with the permission of the landlord sank wells in the land demised, he was not entitled, under the Hindu law, to any compensation therefor, from the landlord, after the determination of the tenancy.

In *Jaymohan Das v. Pallonjee*<sup>2</sup> it was held by *Strachey, J.*, that a tenant who had erected buildings and effected improvements on land demised to him was not entitled to be paid their value on the determination of the tenancy merely because he had acted under a mistaken belief, shared by his landlord, that he had a larger interest (a lease for 999 years) than he really had (one from year to year).

The case principally relied on by the appellant's pleader is that of *Mahalatchmi Ammal v. Palani Chetti*<sup>3</sup>. In that case, a piece of land had been demised as house-site with permission to erect a permanent building thereon. The lease was in writing, and it was construed by the Courts as creating only a tenancy from year to year. The suit was brought by the lessor to recover the house-site and compel the defendants to remove the building they had erected on the land. The lower appellate Court passed a decree to the effect that the plaintiff should either pay to the tenant the value of the building and recover the site with the building on it, or sell the site to the defendants. On appeal preferred by the plaintiff to the High Court this decree was confirmed. The material portion of the judgment bearing on the question is as follows:—(*Holloway, J.*) "A piece of land of small value is granted as a house-site. The resumption of such land at all is most uncommon; the general understanding is that the holding shall be in perpetuity at the fixed rent. The contract being in writing we are not at liberty to say that the tenancy is to endure beyond the term expressly fixed, but, following many cases, we are at liberty to say that the resumption shall be only upon the terms of the lessor compensating for the permanent improvements upon the land, and we are certainly not at liberty to say that in so deciding the Principal Sadar Amin is wrong." (*Innes, J.*)—"Plaintiff

1. I. L. R., 10 Mad. 112.

2. I. L. R., 22 Bom. p. 1.

3. 6 M. H. C. R., 245.

lets the land to defendant by an instrument in which it is expressly permitted him to erect permanent buildings. This instrument has been construed as a lease from year to year, and that construction has not been disputed in special appeal. It must, therefore, be taken to be what it has been found to be. But it is clear that it could not have been the intention of the parties that, after the defendant had gone to the outlay contemplated by the agreement of the parties, plaintiff should be at liberty to treat this as a lease from year to year and nothing more, and to eject defendant at any yearly term, with the almost total loss of the advantage to be derived from the money he has been induced, under the agreement, to lay out. For if this were so, all that defendant could do would be to pull his house to pieces and remove the material which would not, of course, realize anything like the value of the building. I think, therefore, that the decision of the Principal Sadar Amin is in accordance with principle in decreeing that plaintiff, before ejecting defendant, must pay the value of the buildings."

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It is by no means clear what the "many cases" referred to as precedents by *Holloway, J.*, are. They are probably cases the principle of which is enunciated in section 51 of the Transfer of Property Act relating to improvements made by the transferee of land, believing in good faith that he is absolutely entitled thereto—and the form of the decree (affirmed by the High Court) giving the option, to the owner of the property, (as in the class of cases referred to in section 51) either to buy the building or to sell the site to the tenant makes it all the more probable that the precedents which *Holloway, J.*, had in view were such cases. The defendant in that case contended that the lease was a permanent one and not one from year to year, though the instrument was otherwise construed by the Courts. The terms of the lease are not set forth either in the report of the case or in the judgments. But if the lessee believed in 'good faith' [*vide* S. 3, cl. (20) of the General Clauses Act X of 1897]—as is probable from the circumstances adverted to in the judgment of *Holloway, J.*—that he had, in the property, the absolute interest of a permanent lessee and in such faith erected a permanent building on the site, the case would probably fall within the class of cases referred to in S. 51 of the

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Transfer of Property Act (*Shaik Husain v. Govardhandas Paramanandas* <sup>1</sup> cf. *Jagmohan Das v. Pallonjee* <sup>2</sup>).

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The decision of *Innes, J.*, however, seems to proceed on a different principle. From the fact that the lease expressly permits the tenant to erect permanent buildings, the learned Judge apparently implies, as one of the terms of the contract of letting, that the lessor would not exercise his right of ejectment without paying compensation for the buildings erected by the tenant. Whether the learned Judge would have implied such a term, if the lease had been not one from year to year, but one for a term of 20 years (as in the present case) or for a longer period, it is not possible to say. If such a term is to be annexed to the contract by implication, it will be difficult to make a distinction (in this respect) between leases for a short term and leases for a long term. With all deference it is not possible to hold that such a term can be annexed by implication. If there be a well-established usage to that effect, it will of course be an incident of the contract. But, as already shown, the customary law of the land is otherwise and Narada's text (verse 20 already quoted) refers specifically to the taking of land on lease for building purposes. If, in the above case, the lessee had, as he might have, terminated the yearly lease shortly after he erected the building, could he have required the landlord to pay him the cost of the building or sell to him the land? The only difference between letting land without permission—either express or implied—to erect buildings thereon and letting the same with such permission, is that in the former case the lessee cannot under cl. (p) of S. 108, Transfer of Property Act, erect any permanent buildings on the land (except for agricultural purposes) and if he does so, a suit for a mandatory injunction for the removal of the building even during the term of the lease will lie (*Ramanadhan v. Zamindar of Ramnad*).<sup>3</sup>

It is unnecessary to refer to cases in which it has been held either that the leasehold tenure was a permanent one and therefore an ejectment would not lie, or that the conduct of the lessor was such as to raise an equitable estoppel in favour of the lessee for

1. I. L. R., 20 B. 1 at p. 7.

2. I. L. R., 22 B. p. 1 at pp. 15 and 16.

3. I. L. R., 16 M. 407.

compensation on eviction (*vide Yeshwasabai and Gopikabai v. Ramachendra Tukaram*<sup>1</sup>, *Dattatraya Rayaji Pai v. Shridhar Narayan Pai*.<sup>2</sup> In the present case the lease was for a definite term of 20 years with permission to build on the land, and there can be no pretence that the lessee did or could believe in good faith that he had a permanent right in the property or that any conduct of the lessor, subsequent to the lease, has created an equitable estoppel against his evicting the tenant without compensation.

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The second appeal therefore fails and I would dismiss it with costs.

*Moore, J.*:—I concur in the conclusions arrived at by my learned colleague and in holding that this second appeal should be dismissed with costs.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH).

Present:—The Hon'ble Sir S. Subrahmaniam Aiyar, *Offg. Chief Justice*.

Mr. Justice Boddam and Mr. Justice Bhashyam Aiyangar.

Ramaya ... ... Appellant\* (*Plaintiff*.)

v.

The Secretary of State for India in Council ... Respondent (*Def.*).

*Madras Regulation XXVI of 1802—Madras Act II of 1864, Ss. 1, 2, 3, 26 and 42—  
Madras Act V of 1884 and Act VI of 1900 S. 49, Proviso, 98, 98-A and 98 B—  
Government land—Highway Encroachment—Trespasser not a land-holder—Levy of  
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"Prohibitory or penal assessment" under the Standing Orders of the Board of Revenue is imposed not because the party assessed is a "land-holder" but because he is not a land-holder and does not lawfully occupy the land for which he is assessed.

Such a levy is therefore illegal and not justified by the Madras Revenue Recovery Act and a person from whom the assessment has been levied may recover it back from Government by a suit in the Civil Courts.

\* S. A. No. 166 of 1902.

2nd December 1903.

1. I. L. R., 18 Bom. 66.

2. 17 Bom. 736.

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Per *Subrahmanya Aiyar* Offg. C. J. :—

According to the Madras Regulation, XXVI, of 1802, and Madras Act II of 1864, Ss. 1, 2, 3, 26 and 42, the land in respect of which land-revenue is exigible must be vested in some person or persons other than the Crown and the Crown possesses nothing more than a first charge in respect of the revenue due to it upon the interest of such person or persons realizable by sale thereof.

It is the prerogative of Crown to exact from a subject holding arable land, its proper share of produce thereof or the equivalent of such produce which is the modern land revenue.

In the actual exercise of this prerogative, however, the Crown is not supposed to proceed without any regard to definite and well-established principles i. e., it takes a fixed share of the produce—be it the theoretical sixth of the Hindu writings or the one-half nett again and again proclaimed by the present Government.

Per *Boddam J* :—

Civil Courts are prohibited from going into the question of the amount of an assessment and can only deal with the general question of the liability to assessment.

A person in improper possession of part of the surface of a public road is not a "land-holder" within the meaning of the Revenue Recovery Act (Madras Act II of 1864) and Government has no right to impose any assessment upon him under this Act for such occupation.

It is the prerogative of the Crown to take their share of the produce of land occupied under any such right as can give a saleable interest to the occupier in the land and such as will enable him to be registered under Madras Regulation XXVI of 1802 but this will not justify the Government in assessing a mere trespasser.

The acquisition of a right of way in the public presupposes that the right to the whole surface of the road is vested either by prescription or grant in the public free of any assessment for the use or occupation thereof as such, so long as it exists as a public road and the fact that the freehold of the land is in the Government can only give them the right to deal with so much of the land as is not required by the public for the purposes of the road.

Per *Bhashyam Aiyangar J* :—

Where land is a portion of the "*Gramanattam*" or "Village-site", the freehold in the soil is presumably in the Government.

When a street vests in the District Board under Madras Act V of 1884, only the surface and so much of the air space above and so much of the soil below the surface as is reasonably necessary for the District Board adequately to maintain and manage the street as a street vests in the District Board but this vesting does not transfer to the District Board the ownership in the site or soil over which the street exists.

The proviso to S. 49 of Act V of 1884 empowers the Governor-in-Council from time to time (by notification) to exclude any road or street from the operation of the Act and this notification will have the effect of divesting the District Board of roads or streets already vested in it under the Act.

A street in a '*Gramanattam*' between two rows of houses is not necessarily a highway and it may merely be land belonging to Government, over which, however, there is a right of way to the houses or buildings on either side.

Any obstruction to a highway not vested in the District Board may be dealt with under Ch. X of the Criminal Procedure Code while an obstruction to a highway vested in the District Board may be dealt with under Ss. 98, 98 A and 98 B of Act V of 1884 (as amended by Act VI of 1900.)

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A person encroaching on a highway or Crown land over which there is a right of way in favor of the inhabitants of the street is not a "land-holder" within the meaning of Act II of 1864 or otherwise.

Civil Courts have jurisdiction to decide whether or not the land or person is under liability to be assessed to land-revenue.

*Sri Uppa Lakshmi bhayamma Garu v. Purvis*<sup>1</sup>. *The Secretary of State for India in Council v. Ram Ugrah Singh*<sup>2</sup>; and *The Government of Bombay v. Sundarji Savram*<sup>3</sup> followed.

The practice of levying 'penal charges' or "prohibitory assessments" recognised by the standing orders of the Board of Revenue though of long standing has no legal origin and such a levy is illegal for the following reasons :—

(1) High-ways and other poramboke lands set apart for public or communal purposes are not liable to be assessed to land-revenue so long as they continue as such and have not been lawfully transferred to the head of 'Ayan.'

(2) A person encroaching upon highways or poramboke lands set apart for public purposes can in no sense be regarded as a 'land-holder' or ryot in respect of the land encroached upon.

(3) In the case of all lands, whether poramboke or Ayan, any demand which on behalf of the crown may be made on the occupant thereof with the avowed object of compelling him to surrender or vacate the land is not the imposition of land-revenue and the machinery provided by Act II of 1864 cannot be resorted to for enforcing such demand by Revenue Officers, choosing to give it the name of 'assessment.'

(4) The immemorial and common law prerogative of the Crown in India is only to the *Rajabhogam* or King's share in the produce of the land and the land revenue or assessment now levied on land represents the King's share in the produce and Courts have no jurisdiction to question the rate or share that the Executive Government may fix at the periodical revision of assessments. But a *share* of the produce—however high the share or rate may be in relation to the total produce cannot exceed the produce.

(5) An assessment which is prohibitive and manifestly in excess of what the land may produce and is professedly out of all proportion to such produce is clearly *ultra vires* of Government and such action of the executive is not exempted from the jurisdiction of the Civil Courts.

Whether *Muthayya Chetti v. Secretary of State for India*<sup>4</sup> rightly lays down the law for the Town of Madras :—*Quære*.

Lines as to the course which Legislation should take for preventing encroachments upon Government lands, for protection of public right and claims in India and for the Law of Limitation as regards public rights and claims as distinguished from Crown rights and claims suggested.

1. 2 M. H. C. R. 164.

2. I. L. R., 7 A. 140.

3. 12 Bom. H. C. R. App. 275.

4. I. L. R. 22 M. 100.



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Second Appeal from the decree of the Subordinate Judge's Court of Kistna at Masulipatam, in A. S. No. 15 of 1901 affirming the decree of the Court of the District Munsif of Guntur in O. S. No. 211 of 1899.

*The facts of the case shortly stated are these:—*The owner of a house in a village having erected a pavement on a part of the public road in front of his house, the Government imposed a prohibitory assessment and warned him that a heavier assessment would be imposed if he did not remove the pavement. He paid the money, and sued to recover it from the Secretary of State. The Lower Courts having disallowed the claim, this Second Appeal was preferred on this, among other grounds, that the Government had no power to levy assessment especially as the land was vested in the local board.

*P. Nagabhushanam* for appellant:—S. 49 of the Local Boards Act vests the public roads in the District Board. S. 52 makes it transferable to the Taluq Board. [*Bhashyam Aiyangar J.*—The Court of Appeal in England in a recent case summed up the law in the same way as we did in a case heard by me and *Benson, J.* I take it that the Government was the owner of the property or had a prerogative to tax. *Offg. Chief Justice*, can we question the imposition of revenue.] The mode of recovery is left to the Government under Act II of 1864. But whether land is taxable at all is a matter for the Civil Courts. [*Bhashyam Aiyangar J.* Is road defined in the Act.] Road and Public road are defined. See S. 3 (xxiii). S. 98 provides for dealing with obstructions on public roads. Notice has first to be given. 98-A provides for removal of the encroachment. S. 98-C provides for penalty being imposed upon the person who encroaches on the land vested in the Board and set apart for public purposes. Cl. 4 provides for compensation being revised by Magistrate. (*Bhashyam Aiyangar J.* Is the penalty imposed under 98-C to be revised by Magistrate in case of dispute. *Bodlam J.* No. Compensation for loss is revised by Magistrates but not the penalty under S. 98C.) S. 133 of the Criminal Procedure Code similarly provides for abatement of nuisances. S. 135 provides for the appointment of a jury if there is a dispute as to the ownership of the property itself. (*Bhashyam Aiyangar J.* No possessory suit under S. 9 of Specific Relief Act will lie against Government. Private persons can only sue on title. So the Government can turn out the trespasser). The Revenue Recovery

Act S. 58 excludes the jurisdiction of Civil Courts from inquiring into the quantum of revenue fixed. Public revenue is defined by S. 1 as including cesses etc. The 2nd Section makes the land and buildings thereon etc., responsible for revenue. S. 3 makes the land-holder liable for revenue (*Bhashyam Aiyangar, J.* A trespasser is not a land-holder). S. 26 provides for attachment of holdings and management. The further sections of the Act provide for sale of the land and the issue of sale certificate to the purchaser who will take it free of all incumbrances. The result will be that the public road will vest in the purchaser, and the highway will be extinguished. It shows the absurdity of penal assessment being considered to be revenue.

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*The Government Pleader (E. B. Powell) for respondent:—*This suit will not lie as the payment was not under protest. See S. A. 912 of 1901; 13 M. L. J. 269 (*Bhashyam Aiyangar, J.* That has not been raised in the statement.) The Government as the owner of the land is entitled to impose penal assessment. [*Boddam, J.* The land ceased to be Government's when it was vested in the Board. So you can't impose an assessment for encroachment on what is not vested in the Government.] (*Officiating C. J.* If the encroachment was on the ground below by quarrying, etc., then levying assessment would be intelligible.) The Government have power by notification to withdraw any land from the Local Board (*Officiating C. J.* Where is that. There is no such provision. As for payment under protest, I don't know whether payment in obedience to a demand which might be enforced by summary process is not a payment under protest). 22 M. 100 says that even a payment under protest where there is no illegal coercion cannot be recovered. (*Officiating C. J.* On the other hand a Full Bench of this Court held a payment after issue of public process is payment under protest. See 25 M. 548. *Boddam, J.* In 22 M. the remark is *obiter*. *Bhashyam Aiyangar, J.* It is not raised here. We must go into the case). The public roads, cemeteries, etc., are vested in the Government, and the Government impose prohibitory assessment on the occupants. Otherwise many people with impunity squat upon the public land. (*Bhashyam Aiyangar, J.* There are ample means of protection to Government. You can dispossess such persons. They can't sue you under S. 9 of the

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Specific Relief Act. How can you treat the trespasser as landholder and impose revenue on him and sell land which is not his.) I am instructed to say that the assessment is recovered only personally by attachment of moveables. That is the invariable practice. (*Bhashyam Aiyangar, J.* Many invariable practices are in the teeth of the law. You must act according to law). That, I am instructed to say, is the practice. To hold against the right of the Government would remove the protection which the Government offers for the benefit of the public. (*Bhashyam Aiyangar, J.* You have the Criminal Procedure Code). The Magistrates decline to entertain such cases. (*Bhashyam Aiyangar, J.* They can't say that. *Offg. C. J.* It has been done in many cases. When Ponnusami Tevar's tanks flooded the public roads a jury was called under the Criminal Procedure Code and they decided that a wall should be erected between the road and the tank so that the road and the tank were protected without any trouble to either party). The assessment is imposed only to deter people from occupying lands without right. If the Government is prohibited from doing so, the Government will be hampered in their action. They will in each case have to go carefully into the question of ownership before taking action against trespassers. (*Bhashyam Aiyangar, J.* Ought it not to be so? Before you take action against another you must ascertain your rights. Would it not be iniquitous to impose prohibitory assessment and drive out people from what may be their own lands. And according to your contention the prohibitory assessment cannot be questioned in a suit. In many cases the individual will rather quit the land which may not be worth the assessment imposed.)

I have nothing more to add. Your Lordships will confine the decision to public roads [*Offg. C. J.* I don't know that we should do that. *Bhashyam Aiyangar, J.* We must settle the principle, as the matter has now come before us. How can the Government impose assessment on its own land as if the trespasser was a landholder and recover it as if it were charged on the land belonging to itself or by attachment of his moveable properties].

The Court delivered the following

JUDGMENTS :—THE OFFICIATING CHIEF JUSTICE.—The question raised in this case is indeed a very important one, though the

amount in dispute is but a trifle—four annas and one pie—being the amount collected by Government from the appellant in connection with his having erected a platform and a shed over a portion of a path, by the side of which his house is situated in a village in the Kistna District. The effect of the findings by the Lower Court, I take to be that the owners of the houses adjoining the path inclusive of the appellant, have only a right of way over it, the free-hold in the soil being vested in the Government.

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The point for determination is, whether the levy of the amount in question as land-revenue payable in respect of the site of the platform and the shed, is lawful. A levy of the kind under consideration is known in the language of Revenue Standing Orders as a "prohibitory assessment." That the practice of making such collections has been allowed to prevail so long is to my mind entirely due to the phraseology adopted in describing it when it was introduced; and it strikingly illustrates how the true nature of a thing can be altogether obscured by a mere name unwittingly given to it and allowed to pass current without scrutiny.

The term 'assessment' in the sense material to the present discussion means "the setting, fixing or charging a certain sum upon, as a tax." At first sight, therefore, the phrase "prohibitory assessment" when applied to an impost by Government with respect to land, strongly suggests the notion that such imposition is in the due exercise of the prerogative possessed in this country by the Crown, viz., that of exacting from a subject holding arable land, the Crown's proper share of the produce thereof or the equivalent of such produce which is the modern land revenue. When, however, the matter comes to be examined, the erroneous character of this suggestion becomes apparent.

Now, it is indisputable that the prerogative or right referred to, rests entirely on the assumption that the subject on whom the demand is to be made is, as between the Crown and himself, a lawful holder of the land, having a substantial and well-marked description of interest in it by virtue of which alone he becomes liable to the tax. In support of this statement it is no longer necessary to refer to authorities other than the provisions of two statutes which contain the whole law bearing on the subject, so far as land

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outside the town of Madras is concerned, viz., the Revenue Recovery Act, (Madras) Act II of 1864 and Madras Regulation XXVI of 1802.

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Of the former, sections 1, 2, 3, 26 and 42 are alone material. The person who has to pay the land tax or revenue is referred to in the enactment as a 'land-holder' and section 1 explains the term as comprising "all persons holding under a Sannad-i-Milkeut istimrar, all other Zemindars, Shrotriendars, Jagirdars, Inamdars, and all persons farming the land revenue under Government: all holders of land under ryotwar settlements or in any way subject to payment of revenue direct to Government." Section 2 provides that "the land, the buildings upon it and its products shall be regarded as the *security* of the public revenue"; and the next section speaks of the land in respect of which the revenue is due as 'his' (the land-holder's) land. Section 26 authorises attachment and sale of the land on account of arrears of revenue, uses similar language and describes it as the "defaulter's" land. Lastly, section 42 provides that out of the proceeds of such a sale any balance remaining after the discharge of the arrears, shall be paid over to the defaulter or on his account.

As to Regulation XXVI of 1802, it entitles every land-holder to have his name registered in the public registers directed by that Regulation to be kept of landed property paying revenue to Government, and of transfers thereof from one proprietor to another; the effect of such registry, with reference to the Revenue Recovery Act being on the one hand to secure to the proprietor the right of insisting on the observance in regard to him of the formalities to be attended to by the authorities engaged in the collection of the public revenue, and on the other, to entail on him certain responsibilities in respect of the revenue.

These various provisions show beyond the possibility of a doubt, that the land in respect of which *land-revenue* is leviable is vested in some person or persons other than the Crown; and that the Crown possesses nothing more than a charge (though a first charge) in respect of the revenue due to it, upon the interest of such person or persons, realizable by sale thereof. They absolutely preclude the supposition that any Crown-demand is recoverable as

land-revenue, unless it be something due from one who is a land-holder as defined by the Act.

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It may not perhaps be superfluous to point out that in the actual exercise of the prerogative of the Crown above referred to, the Crown is not supposed to proceed without any regard to definite and well-established principles; for neither in olden times nor now, has the Crown been held entitled to more than a fixed share of the produce—be it the theoretical one-sixth of the Hindu writings or the half nett again and again proclaimed by the present Government as the share it takes or some other; Section 58 of the Revenue Recovery Act having been enacted in order to save the Crown from endless litigation in Courts to which but for such a provision it would be exposed, having regard to the intricate details necessarily incident to a system of assessment, involving in theory at least the ascertainment of the produce of every acre of land in the country and the commutation of the Crown's share thereof with reference to market prices for a definite period such as the usual 30 years for which settlement money rates are fixed.

Such being the fundamental principles governing the assessment and collection of the land-revenue, it will be plain that what is called prohibitory assessment rests on grounds diametrically and totally opposed to those principles. In the first place this kind of assessment is professedly imposed only in cases where the land is not lawfully occupied by the party assessed; and it is to compel the immediate abandonment of such occupation that the assessment is made prohibitive. In other words it is imposed not because the party assessed is a land-holder but because he is not. In the next place, the assessment is not with reference to the recognised half-nett principle applied in the case of the land-holder, but avowedly in disregard thereof, it being often a hundredfold, for the obvious reason that the party has by his own wrong disintitled himself to invoke the application of that principle to his case.

In short the levy is no assessment at all in the proper sense of the term, but a penalty and a fine under the misnomer of land revenue, and levied under such a guise by putting in force legislative provisions absolutely inapplicable to the collection of such a demand. The truth of this view can be easily realized if the

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matter be tested with reference to the cardinal principle that land-revenue forms the first charge on the land. To apply this principle to cases of prohibitory assessment must lead to the manifest absurdity of one's own land becoming charged with a debt due to himself. And a sale of the land can confer nothing on the purchaser as, *ex hypothesi*, the person assessed possesses no interest in the property. The learned Government Pleader stated that land, in respect of which such assessment is imposed, is never brought to sale, the demand invariably being enforced by proceeding against the person of the party assessed or his property. This is virtually as clear an admission as can be on the part of the revenue authorities of the invalidity of the demand.

It only remains to observe that the decision of the question can in no way be affected either by the circumstance on which the learned Government Pleader laid so much stress, viz., that the system of prohibitory assessment has on the whole operated effectually to check encroachments on land which public interests require should remain unoccupied; or by the consideration, urged not without foundation, on behalf of the appellant, that the system apart from its invalidity, is often worked in a way never contemplated by its inventors, and not infrequently, is made use of by low-paid village and other officials for purposes of exaction. If the remedies available under the law as it stands, with reference to encroachments on the property of the Government or the public be inadequate, that is a matter for the legislature and not for the Courts to deal with.

Turning now to the facts of the present case, it is manifest that the appellant possessed no interest in land such as would constitute him a land-holder within the meaning of the Revenue Recovery Act, for, his right over the path was merely that of passage and the erection by him of the platform and the shed was purely a wrongful act and a trespass.

Consequently, the impost in question was not land revenue, and the demand therefor, as if it were such revenue, was altogether unauthorised.

I would, therefore, allow the second appeal in so far as the claim to the refund of 4 as. and 1 pie is concerned and amend the

decrees of the Lower Courts by directing payment to the plaintiff by the defendant of the said amount but without costs.

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*Boddam, J.* :—This action was brought to have the plaintiff's right declared to certain piece of land and to recover 4 annas and 1 pie collected from the plaintiff by the Government as assessment for occupying the said land.

The plaintiff built a pial and shed to his house upon land which was part of a public road and the Government thereupon assessed him 4 annas and 1 pie for occupying the same and gave him notice to remove his pial and shed. They also informed him that in future they would charge enhanced cist.

In his action the plaintiff claimed that the land upon which he had built his pial was his own land, but it has been found that the site of the pial is part of a public road.

Both the Lower Courts dismissed the plaintiff's suit and so far as the claim for a declaration that the land was the plaintiff's land their decree is right. The only question for our determination is whether the Government have any right to assess the defendant as an occupier of part of a public road.

The assessment of the plaintiff is said to be a penal assessment but that is immaterial as Civil Courts are prohibited from going into the question of the amount of an assessment and can only deal with the general question of the liability to assessment. Penal assessment as such is unknown to the law and the only rights the Government have to impose assessment are under statute or by virtue of the prerogative of the Crown.

The statutory right of Government to assess for revenue depends upon Act II of 1864 (Madras).

That Act after defining the words "land-holder" as "all persons holding under a Sannad-i-Milkent Istimrar, all other Zemindars, Shortriemdars, Jaghirdars, Inamdars and all persons farming the land revenue under Government. All holders of land under Ryotwar settlements or in any way subject to the payment of revenue direct to Government", enacts that every "land-holder" shall pay the revenue due upon his land and that the land and



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buildings upon it and its products shall be regarded as the security of the public revenue. It gives power to recover arrears by distraint and sale of the defaulter's moveable and immoveable property, and on a sale all lands purchased are free of all encumbrances.

It is clear that the plaintiff was not a land-holder within this Act. He was improperly in possession of part of the surface of the public road and the Government had no right to impose any assessment upon him under this Act for such occupation.

The only other right which the Government have to assess land is the prerogative of the Crown to take their share of the produce of the land occupied under any such right as can give a saleable interest to the occupier in the land and such as will enable him to be registered under Regulation XXVI of 1802. This prerogative cannot, however, justify the Government in assessing a person in the position of the plaintiff. The plaintiff in derogation of the rights of the public to have the use of the whole surface of the road for passing and re-passing has monopolised a portion of the surface to the exclusion of the public. He is a mere trespasser. His act is an injury to the public and his erection is a nuisance. He is not an occupier with any present or prospective saleable interest in the land and the fact that the freehold is in the Government can give them no right to interfere with the right of the public to the surface of the road so as to entitle them to raise revenue from one who obstructs that right or to in any way recognize him otherwise than as a wrong-doer and a nuisance. The acquisition of a right of way in the public presupposes that the right to the whole surface of the road is vested either by prescription or grant in the public free of any assessment for the use or occupation thereof as such so long as it exists as a public road, and the fact that the freehold of the land is in the Government, can only give them the right to deal with so much of the land as is not required by the public for the purposes of a road. It certainly cannot give the Government a right to derogate from its own grant or to limit the rights of the public by assessing a person wrongfully occupying the surface of the land or otherwise recognising the illegal occupation of a portion of the surface of the road to the curtailment of the right of the public to pass and re-pass over the

whole of the surface thereof. So far therefore as the claim for annas 4 and pie 1 the plaintiff is entitled to a decree and to that extent but to the extent alone the decree of the Court below is wrong and should be reversed.

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As, however, the plaintiff's suit was based upon his right to the land alone and the issues raised were practically confined to this question, I should allow no costs to the plaintiff.

*Bhashyam Aiyangar, J.*—The case has been argued on both sides on the footing that the lane in question is, according to the concurrent findings of the Courts below, a highway or 'public street' as defined by S. 3, cl. (ix) and (x) of Act V of 1884—corresponding to Section 3, cl. xxiii—substituting 'road' for 'street'—of the Act as amended by Act VI of 1900—which under S. 49 of that Act vested in the District Board of Kistna. The question for decision is whether it was legally competent for the Collector to levy from the plaintiff a "penal assessment" for his encroachment on the street by erecting two pials and a pandal. The penal assessment of Re. 0-4-1 was levied and collected on the 13th April 1898 as if the same were an arrear of revenue due on the land encroached upon and this action has been brought to recover the amount as having been illegally levied and collected (See *Narayanasami Reddi v. Osuru Reddi*.<sup>1</sup>)

The lane in question is apparently a portion of the '*Gramanattam*' or 'Village-site' and presumably the freehold in the soil is in the Government; and if, as was assumed during the argument, the lane or street had continued to vest in the District Board in 1898—when the penal assessment was imposed—then according to the decision in *S. Sundaram Ayyar v. The Municipal Council of Madura*<sup>2</sup> the street *qua* street i. e., the surface and so much of the air space above and so much of the soil below the surface as is reasonably necessary to enable the District Board adequately to maintain and manage the street as a street, was vested in and belonged to the District Board. In the 25 Madras case the legal effect of the statutory vesting of a street in a Municipality [by Act (Madras) IV of 1884 as amended by Act III of 1897] was

1. I. L. R., 25 M. 548.

2. Ibid, 635.

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considered and the conclusion arrived at on a review of various Engosh and some Indian decisions was that such vesting did not transfer to the Municipality the ownership in the site or soil over which the street exists. This conclusion is fortified by the recent decision of the Court of Appeal in *Finchley Electric Light Company v. Finchley Urban District Council* in which after a review of all the English decisions, *Collins*, M. R. stated "The conclusion to be derived from the authorities seems to me to be this ; all the stratum of air above the surface, and all the stratum of soil below the surface which in any reasonable sense can be required for the purposes of the street as street, vest in and belong to the local authority" (at p. 441).

The assumption, however, on which the argument proceeded, viz., that in 1898, the lane in question continued to vest in the District Board of Kistna, seems however to be open to doubt. The proviso to section 49 of Act V of 1884 empowers the Governor-in-Council from time to time (by notification) to exclude any road or street from the operation of the Act. Though the wording of this proviso is somewhat inartistic and not sufficiently precise to give the notification the effect of divesting the District Board of roads or streets already vested in it under the Act, yet there can be little doubt that such was the intention of the Legislature and the proviso should be so construed. On reference to the list of 'Local Rules and orders' I find that a notification (L. and M. No. 503, dated the 21st July 1896,—*Fort St. George Gazette*, 1896, Part I A, p. 182) has been issued by the Local Government excluding from the operation of the Act all streets and roads then existing in the District of Kistna other than those specified therein and I have little doubt that the lane in question is not among those thus specified though there is nothing on the record to show what the name of the lane in question is if it at all has any name. If so, it must be taken that in 1898, when the penal assessment was levied, the lane or street did not continue to be vested in the District Board.

In the view I take of the case, it is, however, immaterial whether or not at the time in question the lane vested in the District Board of Kistna, nor is it even material whether it was in

reality a 'street' in the sense of being a highway. Neither the Settlement Register for the village nor the Ayacat or Pymash register has been produced in the case, which would show whether or not the lane in question has been excluded as 'road' (or 'Bhatai Poramboke'); and I am not sure that the finding of the Courts below that the lane in question is a 'public lane' is correct. A street in a 'Gramanattam' between two rows of houses is not necessarily a highway and it may merely be—as it generally is in rural tracts—land belonging to Government, over which however there is a right of way to the houses or buildings on either side. Assuming as found by the Courts below that the free-hold in the soil of the lane belongs to Government, the lane is either a highway—whether or not it was in 1898 vested in the District Board of Kistna—or land over which there was merely a right of way to the houses on either side. If it is a highway,—though not vested in the District Board, any obstruction or encroachment may be dealt with under the provisions of Ch. X of the Code of Criminal Procedure; if it is a highway vested in the District Board it will be competent to the District Board, under Sections 98, 98A and 98B of Act V of 1884 (as amended by Act VI of 1900) to take measures for the removal of encroachments thereon. But whether it is a highway or merely Crown-land over which there is a right of way in favour of the inhabitants of the street, it is in the very nature of things land exempted from assessment; and any person encroaching thereon is a trespasser (civil) and in no sense a 'landholder' either within the meaning of Act II of 1864 or otherwise. The Standing Orders of the Board of Revenue under which a 'penal charge' or 'prohibitory assessment' is imposed on and levied from such a trespasser expressly declare that the amount imposed should "be sufficiently heavy to compel the immediate surrender of the land" encroached upon and this amount is increased from year to year till such surrender. This practice though one of long standing has no legal origin and it is impossible to uphold its legality. It is in truth and fact what it candidly purports to be, viz., an effective mode of ejecting supposed trespassers, not in due course of law but by imposing a crushing fine and realizing the same summarily under Act II of 1864, as if it were land-revenue due to Government by a ryot holding assessed land. The custom is also unreasonable as it will equally compel a

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person who is in or has taken possession of his own land and is not really a trespasser—though supposed to be such by the Village or other Revenue authorities—to relinquish or vacate the land rather than pay a crushing assessment, which, if paid for some years, will even exceed the full value of the land.

It is assumed and argued that such action of Revenue officers cannot be questioned in Civil Courts which, by S. 58 of Act II of 1864, are prohibited from taking into consideration or deciding any question as to the rate of land-revenue payable to Government or as to the amount of assessment to be fixed or to be hereafter fixed on the portions of a divided estate. Civil Courts do have full jurisdiction to decide whether or not the land or person is at all under liability to be assessed to land-revenue (see *Sri Uppu Lakshmi Bhayamma Garu v. A. Purvis*<sup>1</sup>—*The Secretary of State for India in Council v. Ram Ugrah Singh*<sup>2</sup>—*The Government of Bombay v. Sundarji Savram and others*<sup>3</sup>—If such liability does exist, the rate or amount of assessment fixed by Government cannot be questioned or revised by a Civil Court.

The right of Government to assess land to land-revenue and to vary such assessment from time to time is not a right created or conferred by any statute, but, as stated in my judgment in *Bell's Case*<sup>4</sup> is a prerogative of the Crown according to the ancient and common law of India. The prerogative right consists in this, that the Crown can by an executive act determine and fix the 'Rajabhagam' or King's share in the produce of land and vary such share from time to time. This necessarily implies and pre-supposes that the occupant of the land has an interest in the land and is entitled to the occupant's or ryot's share of the produce as distinguished from the King's share. The same idea is often expressed in the words that the Crown is entitled to the *Melvaram* in the land and the ryot to the *Kudivaram*. It therefore necessarily follows that the Crown cannot impose land-revenue upon lands in which, according to its own case, the person in occupancy has no title or interest or *Kudivaram* right. That such is the nature and extent of the prerogative right of the Crown is fully borne out by Regulation XXVI of 1802 and the provisions

1. 2 M. H. C. R., 167. 2. I. L. R., 17 All. 140. 3. 13 B. H. C. R. App. 275.  
4. I. L. R., 25 M. 482.

of (Madras) Act II of 1864. The definition of the term 'land-holder' in S. 1 of the Act (II of 1864) would be inapplicable to persons in possession of land merely as trespassers and to cases in which the land is not subject to the payment of revenue to Government. S. 2 which declares that the land, the buildings upon it and its products shall be regarded as the security for payment of the public revenue, necessarily implies that the occupant of the land who has to pay the revenue has a right in the land and its products. S. 3 imposes upon the land-holder the obligation to pay the revenue due upon the land and S. 42—which provides for the sale of the defaulting ryot's land free of incumbrances created by him and for payment to him of the balance of the sale-proceeds after deducting the arrears of revenue—clearly shows that he has a substantial interest in the land.

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The learned pleader for the Crown says that when penal assessment is imposed, the land encroached upon is not brought to sale but that the movable and immovable properties of the person on whom the penal or prohibitive assessment is imposed are distrained and brought to sale under the Revenue Recovery Act. This is a virtual admission that the so-called 'prohibitive assessment' is not really revenue assessed upon the land but a fine imposed on and levied from the trespasser by the machinery of the Revenue Recovery Act. Under S. 52 of Act II of 1864, all arrears of revenue due to Government—besides land-revenue—and advances made by the Government for cultivation or other purposes connected with the revenue and all fees or dues payable to or on behalf of village servants employed in revenue or police duties and all cesses lawfully imposed upon land may be recovered under the Act in the same manner as arrears of land-revenue. But the liability to pay these dues must be legally established. If, as already stated, the penal charge or prohibitory assessment cannot be legally regarded as the King's share of the produce or land-revenue, much less can it be regarded as coming under any of the heads of dues mentioned in S. 52, which can be collected in the same way as arrears of land-revenue.

It is unnecessary to refer to other legal objections to the imposition of a penal charge of prohibitory assessment on trespassers in the various cases mentioned in the Standing Orders of

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First, that highways and other poramboke lands set apart for public or communal purposes are not liable to be assessed to land-revenue so long, at any rate, as they continue such and have not been lawfully transferred to the head of 'Ayan' and thus incorporated with lands to be cultivated and assessed to public revenue,

secondly, that a person encroaching upon highways or poramboke lands set apart for public purposes can in no sense be regarded as a 'land-holder' or ryot in respect of the land encroached upon,

thirdly, that in the case of all lands, whether poramboke or Ayan, any demand which on behalf of the Crown may be made on the occupant thereof with the avowed object of compelling him to surrender or vacate the land is not the imposition of land-revenue and the Machinery provided by Act II of 1864 for the realization of arrears of revenue cannot be resorted to for enforcing such demand by Revenue officers choosing to give it the name of 'assessment' (penal or prohibitory) and crediting it to the head of land-revenue in the public accounts; and

fourthly, that the immemorial and common law prerogative of the Crown in India is only to the Rajabhagam or King's share in the produce of the land and the land-revenue or assessment now levied on land represents the King's share in the produce and the Courts have no jurisdiction to question the rate or share that the executive Government may fix at the periodical revision of assessments but a share of the produce—however high the share or rate may be in relation to the total produce—cannot exceed the produce. An assessment, therefore, which is prohibitive and manifestly in excess of what the land may produce and is professedly out of all proportion to such produce is clearly *ultra vires* of Government and such action of the executive is not exempted from the jurisdiction of the Civil Courts.

It is significant that in Section 58 the word "rate" is used in the first part of the section and not 'amount' which is used in the latter part of the section.

It is unnecessary to consider here the decision of this Court in *Muthayya Chetti v. Secretary of State for India*<sup>1</sup>—cited on

behalf of the Crown—in which this Court upheld the legality of a levy of penal assessment upon some lands situate in the Town of Madras, which was found in the case to be the property of the Crown and at its absolute disposal. That decision is based entirely upon the construction of the two Acts XII of 1851 and VI of 1867 relating to the Town of Madras and it is inapplicable to the present case as the said Acts do not apply to it and the land in question is not land at the disposal of Government, but is either a public road or at any rate land subject to a right of way in favour of the inhabitants of the street.

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It is however strongly urged on behalf of the Government that the imposition of a penal assessment is necessary and justifiable in the interests of the State and of the public as the most effective mode of checking encroachments on Crown lands, highways and poramboke lands set apart for public or communal purposes. As against this it is pointed out that this practice is highly oppressive and liable to considerable abuse—especially at the hands of village officers and other subordinate revenue officials and attention is drawn to the facts of the case reported in *Sappani Asari v. Collector of Coimbatore* (S. A. No. 1221 of 1900) in which it appears a prohibitory assessment of Rs. 100 a year was imposed on a village site of 4 cents with the object of ejecting the occupant therefrom, notwithstanding that—as was eventually decided in the Letters Patent Appeal<sup>2</sup>—the occupant had a valid grant of the same under the Darkhast rules and had erected a pucca building on the site relying on such grant.

Such considerations *pro* and *con* can carry no weight in deciding whether the imposition and levy of prohibitory assessment is or is not legal. But having regard to the importance of the question, I think it right to make the following remarks with reference to the considerations that were pressed upon us. If the existing provisions of law contained in the Municipal and Local Boards Acts, the Code of Criminal Procedure and other enactments, if any, are found inadequate to check the evil complained of, recourse must be had to special legislation for effectually checking encroachments and obstructions on or wrongful use or alienation of Crown-lands and poramboke lands set apart for public or communal purposes both in Government villages and Zamindaris—whether such encroachment,

1. 12 M. L. J. B. 417.

2. I. L. R., 26 M. 742.



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obstruction, wrongful use or alienation be by private individuals— including 'land-holders' specified in S. 3 of Madras Act VIII of 1865 or by Municipal Councils or other local authorities. Any such legislation, if deemed necessary, will of course proceed on lines consistent with the just and constitutional principles of British legislation, I may add that for the effectual protection of public rights and claims in this country, provision must be made in the Code of Civil Procedure enabling two or more persons, with the previous sanction of a principal Civil Court of original jurisdiction or of the Collector of the District to institute a suit for the vindication of such right or claim when infringed, whether by a private individual or by Municipal Corporation or other local authority or by the Crown. Such provision has been made in the case of Hindu and Mahomedan religious institutions by S. 18 of the Religious Endowments Act (XX of 1863) and a similar provision is made by S. 539, Civil Procedure Code, in regard to public religious or charitable trusts.

The law of limitation as regards public rights and claims as distinguished from Crown rights and claims is equally defective. S. 17 of Act XIV of 1859 saved from the operation of that Act 'any public right, property or claim.' When that Act was repealed by Act IX of 1871, care was taken to fix a period of 60 years in respect of any suit by or on behalf of the Crown, but no section was inserted in the Act corresponding to S. 17 of Act XIV of 1859. The present Indian Limitation Act (XV of 1877) is the same in this respect except that by Act XI of 1900, a new Art. 146 A was added prescribing a period of 30 years for a suit by or on behalf of any local authority for possession of any public street or road or any portion thereof of which it has been dispossessed or has discontinued possession. For the reasons mentioned in my judgment in the case of *Sundaram Aiyar v. The Madura Municipal Council* it is desirable to raise this period also to 60 years. A fresh article should be added prescribing a like period of 60 years for any suit to establish a public right or claim.

In the result I would allow this second appeal and reversing the decrees of the Courts below decree the plaintiff's claim for the refund of 4 annas and 1 pie but without costs, as the plaintiff has failed to establish the title which he set up to the land covered by the pials and the pandal.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson, Mr. Justice Bhashyam Aiyangar  
and Mr. Justice Russell.

Sivagami Achi ... Appellant\* (7th Defendant) (7th  
Counter-Petitioner).  
v.

Subramania Aiyar ... Respondent (Plaintiff) (Petitioner).

Civil Procedure Code, Ss. 244, 287 and 288—Proceedings under S. 287—Ministerial  
not Judicial—No Order—No Appeal under S. 244,

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Proceedings of a Court under S. 287, Civil Procedure Code, and the rules framed  
thereunder in relation to the proclamation of sale are not 'orders' and are,  
therefore, not appealable as 'decrees.'

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The provision in S. 287, Civil Procedure Code, as to summoning witnesses and  
making enquiries, and the provision in S. 288, Civil Procedure Code, as to exemption  
of Judges are confirmatory of this view.

Appeal from the order of the Court of the Subordinate Judge  
of Kumbakonam in E. P. No. 215 of 1902 (Original Suit No. 40  
of 1900).

The Court (the Honourable Mr. Justice Boddam and the  
Honourable Mr. Justice Bhashyam Iyengar) made the following

**ORDER OF REFERENCE TO A FULL BENCH :—**This  
appeal relates to the settlement of the proclamation of sale made  
by the court to carry out an order absolute for sale of property  
ordered to be sold under a mortgage decree. The grounds of  
appeal taken are as to the estimated market value of the property  
set out, the place where the sale is to take place, the lots in which  
it is to be sold and the amount for the recovery of which the  
property is to be sold. A preliminary objection is taken that no  
appeal lies against the proceedings of the Court under S. 287, C. P.  
C., and the rules of the High Court framed thereunder and that  
such proceedings are not orders within the meaning of S. 244, C. P.  
C., as the expression 'order' is defined in the Code.

We are disposed to think that the preliminary objection is well  
founded and that under S. 287, C. P. C., the proceedings are in  
themselves administrative and not judicial but that if and when a  
sale does take place, if ever, and it has to be judicially confirmed  
objections may be taken to the confirmation of the sale on any of  
the grounds mentioned in S. 311, C. P. C., some of which may

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relate to the contents of the proclamation. This view receives strong corroboration from the provision enacted by S. 288, C. P. C., that no Judge or other public officer shall be answerable for any error, misstatement or omission in any proclamation under S. 287, C. P. C., unless the same has been committed or made, dishonestly a provision which in view of Act XVIII of 1850, would have been quite superfluous if proceedings under S. 287, C. P. C., were 'judicial' and not 'administrative.'

Against an order confirming or refusing to confirm a sale there is a right of first appeal under S. 588, C. P. C., and no second appeal can lie, but if proceedings under S. 287, C. P. C., are regarded as orders passed under S. 244, C. P. C., relating to proceedings execution between parties to the suit there will be not only a first appeal but also a second appeal. In support of the right of appeal *Sivasami Naicker v. Ratnasami Naicker* <sup>1</sup> and *Ganga Prasad v. Raj Coomar Singh* <sup>2</sup> are relied on by the vakil for the appellant but we doubt whether in those cases the above considerations were urged before the courts and whether in deciding them it was intended to decide that the proceedings of the Court under S. 287, C. P. C., and the rules framed thereunder were orders within the meaning of S. 244, C. P. C.

In these circumstances we refer for the opinion of a Full Bench the following question.—

“Whether all or any of the proceedings of a court passed under Section 287, C. P. C., and the rules made thereunder in relation to the proclamation of sale are an 'order' within S. 244, C. P. C., and as such appealable as a decree.”

*K. Balamukunda Aiyar*, for appellant.

*C. R. Tiruvenkatachariar*, for respondent.

*C. R. Tiruvenkatachariar*.—Proceedings under S. 287, are they judicial and does the order fall under S. 244? S. 287 shows that the description of the property is to be given and value to be judged by the decree-holder. The High Court under the last clause has power to frame rules for the guidance of courts. Rule has now been framed. See Rules 148, 149 and 150. Leave to bid may be given. (*Bhashyam Aiyangar*, J. Is there an appeal against such orders

1 I. L. R., 23 M. 568.

2 I. L. R., 30 C. 617.

under S. 588). No appeal is provided against a refusal of leave to bid. It is not an order at all. Wherever the code contemplates an order by court it expressly says so. (*Bhashyam Aiyangar, J.* If it is an order, an order to whom? and what is the definition of an order). It is defined. See S. 2. First in S. 294 giving leave to bid is not an order, but if he purchases without leave an order is passed setting aside the sale. See Ss. 280, 283, 284 where "order" is used. Order is defined as an adjudication or decision, which the order under S. 287 is not. S. 312 deals with an order setting aside a sale or refusing to set it aside. (*Bhashyam Aiyangar, J.* In these sections no provision is made to summon witnesses because they are Judicial Proceedings, but as the order under S. 287 is not judicial, so special provision is made for summoning witnesses and binds them to speak the truth. S. 291 etc., provide for carrying out the sale. They are not appealable as orders, but they may be made the grounds of complaint in an application to set aside the sale. (*Bhashyam Aiyangar, J.* That is, these administrative acts will be considered when the court is judicially invoked to set aside the sale for irregularity). Again when irregularity is complained of under S. 311 relief is granted only if it has produced material loss. If this order is a decree and an appeal is preferred under S. 540, S. 578 must apply which says that irregularity is no ground of interference unless it has affected the merits. In these cases mere irregularity is the ground of complaint. It may not result in loss to judgment-debtor. The sale itself may not take place; the money may be paid up. Decree is defined as an order relating to questions mentioned in S. 244, but not mentioned in 588. That shows that if the matter is one which comes under S. 588, 244 will not apply. This comes under S. 588, Cl. 16 as irregularities have to be considered in making the order referred to in that clause (*Bhashyam Aiyangar, J.* but not specified in S. 588 goes with "order"). Grammatically it does not; and no questions are referred to or specified in S. 588 (*Benson, J.* That shows your construction wrong. Has it ever been construed as you do now. *Bhashyam Aiyangar, J.* This point is unnecessary to your case).

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*Balamukunda Aiyar* for appellants: The order is a judicial one. (*Bhashyam Aiyangar, J.* If that is so, why is power given to

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summon witnesses and why is the Judge protected from liability for mistakes). That the order is judicial appears from the rule which has been framed by the High Court under the Act. The rule clearly requires the court to determine after notice what should be entered in the proclamation. (*Bhashyam Aiyangar, J.* The rules are subordinate to the Act). The rules have the force of law, and they declare the meaning of the Act. The order relates to execution. The order is therefore one under S. 244 (*Bhashyam Aiyangar, J.* Is there an order within the definition in the Act. These are the acts of the court in conduct of the sale). 20 A., 412 lays down that the court should decide the price of property. What will be a ground of avoidance of sale afterwards may be rectified by court even before sale. In 23 M. 568 the court held that such orders as these in execution, if they did not fall under S. 588, is a decree. See also 9 C. 214 (*Bhashyam Aiyangar, J.*). That won't carry the matter further than 30 C. the latest case of the Calcutta High Court. Moreover if it was an order of Court, no proceeding under S. 311 could be taken. There must be irregularity and loss. How can you prove that irregular which has been settled by a judicial order of court). If no appeal is preferred against the order under S. 244, I shall have acquiesced in the irregularity and no application under S. 311 will afterwards be granted. See *Arunachallam v. Arunachallem*, 12 M. 19.

(*Bhashyam Aiyangar, J.* You have not acquiesced. If you did not appear on notice, it will be so. But if you object and your objections are overruled, you can apply under S. 311, but you cannot appeal against the order).

This appeal against order coming on for hearing, the court expressed the following

OPINION.—Our answer to the reference is that in our opinion none of the proceedings of a court under S. 287, C. P. C., and the rules framed thereunder in relation to the proclamation of sale is an "order" within S. 244 and as such appealable as a "decree".

We concur in the reasons given in the order of reference, and we may add that the view that the proceedings in themselves under

S. 287 are of an administrative and not a judicial character is further supported by the fact that special provision is made in S. 287 to summon witnesses and make enquiry into the matters referred to in the section, a provision which would be superfluous if the proceedings were judicial. We are therefore constrained to dissent from the decisions in the cases reported in I. L. R., 23 M. 568, and 30 C. 617.

To allow an appeal, and, as a consequence, a second appeal, in regard to proceedings under S. 287 as if they were orders made under S. 244, and therefore decrees, would enormously increase the difficulties and delays which even now occur in obtaining the execution of decrees, and that without any counter-balancing advantages. For if the sale is eventually held, and a material irregularity in publishing or conducting it is proved and loss has thereby been caused to the objector he can get the sale set aside; whereas even if there has been an irregularity but no loss has resulted it is contrary to the policy of the code (Section 311) to interfere with the sale.

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#### IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr Justice Benson. Mr. Justice Bhashyam Aiyangar  
and Mr. Justice Russell.

Kangay Gurukkal and others... Appellants\* (*Defendants*)  
v.

Kalimuthu Annavi ... Respondent (*Plaintiff*).

*Transfer of Property Act, Ss. 58 (a) and (b), 67, 68 and 18—Mortgage—Combination of usufructuary and simple—Redemption by paying mortgage-money within a year—Covenant to pay.*

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Annavi.

Where by a mortgage instrument the mortgagor gives possession of the mortgaged property to the mortgagee and states that the mortgagor shall cause the money to be paid within a certain date and redeem or recover back the land by paying the money on a certain date in a particular year, but that if he does not so pay within the said period and recover the land, he may pay the money on the corresponding date of any future year and recover back the land :—

Held, (1) that there is a covenant or promise on the part of the mortgagor to pay the mortgage money,

(2) that the mortgage is a combination of a simple and an usufructuary mortgage within the meaning of S. 98 of the Transfer of Property Act,

(3) that the right to cause the mortgaged property to be sold in default of payment is implied within the meaning of S. 58, cl. (b),

and (4) that the mortgagee is entitled to a decree for the mortgage-money under S. 68, cl. (a) and a decree for sale under S. 67.

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*K. N. Aiya* for appellants.

*P. S. Sivaswami Aiyar* for respondent.

Kangay  
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v.  
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Annavi.

*S. Srinivasa Aiyangar* for *K. N. Aiya Aiyar* for appellant :—  
The question is whether there is a covenant to pay. It must be a covenant to pay out of the property. It must be a combination of simple and usufructuary mortgage. Otherwise there can be no suit for sale. 24 C. 677 is in point. The document there says "Having paid the money in the month of Chait, I shall take back the document." It was held that there was no covenant. (*Bhashyam Aiyangar*, J. Is there a covenant to redeem. That is the question) 1st. The language in this case is nearly the same. The difference, if any, is in my favour. The language is "by paying I shall redeem". (*Bhashyam Aiyangar*, J. It is more மீட்டுக்கொள்வோமாகவும். We are bound to redeem). ஆகவும் does not import obligation. In the case of other documents the loan itself imports a debt. In the case of a usufructuary mortgage the remedy is only to be in possession. He cannot sue (*Bhashyam Aiyangar*, J. If there is a covenant to pay he can sue). That is not so. I shall come to the effect of the authorities. The document is simply stating what will be done by the mortgagor. 'I shall pay' expresses simple futurity and not any obligation or duty. (*Bhashyam Aiyangar*, J. The documents are drawn by unprofessional men. They want to provide for the return of documents and for redemption also lest the mortgagee may refuse to return the documents). The clause standing by itself seems clear. Taking it with the next clause there is no doubt that there is no covenant to pay. (*Bhashyam Aiyangar*, J. If no covenant was intended, they might have used the language of the next sentence. தேதியில் கொடுத்தால் நீ நிலத்தை விட்டுவிடுவாயாகவும்). That is what was intended. Nobody ever heard of an obligation to redeem. It is a right and not a duty.

*P. S. Sivaswami Aiyar* for respondent :—There is a covenant to pay. The translation in the reference is not correct. The Court translator is right. It must be translated as *I shall be bound to pay and redeem* and not *by paying I shall redeem*. The English sentence "I shall pay and redeem" should be translated by participial forms for all but the last verb. That is the genius of the Tamil language. There is a special rule in the Tamil Grammar to that effect. See



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Pope's Catechism of Tamil Grammar, Rule 101. The word ஆகவும் makes it clearer still (*Russell, J.* If there was no ஆகவும் what is the construction). Even then I should contend there is a covenant to pay. ஆகவும் places it beyond doubt (*Bhashyam Aiyangar, J.* Even without the word it will be so. That perhaps adds strength to the view). I have collected a number of documents, hypothecation bonds and pronotes in which the covenant to pay runs in the same language. As was observed the very next sentence shows what language would have been used if it was only a proviso for redemption. There are two cases in 5 N. W. P. which lay down that an undertaking to redeem on a specified day imports a promise to pay. (*Bhashyam Aiyangar, J.* 'Covenant to redeem' jars upon the ear, no doubt, but a covenant to pay is often expressed by laymen in the form of a covenant to redeem on a particular day). (Further argument was stopped).

The Court expressed the following

**OPINION :—**Our answer to the reference is in the affirmative. The first sentence of the extract from the mortgage instrument quoted in the order of reference does, in our opinion, contain a promise by the mortgagor to pay on the date named, in which case there shall be a right in the mortgagor to get back his lands.

The second sentence of the extract provides that in the event of the mortgagor not paying on the due date, but subsequently, he may pay only on the corresponding day of a future year, and there shall then be an obligation on the part of the mortgagee to give up the land.

The mortgage is therefore a combination of a simple and an usufructuary mortgage, within the meaning of section 98, Transfer of Property Act, and the mortgagee is entitled to a decree for the mortgage money under clause (a) of S. 68 and to a decree for sale under S. 67, the right to cause the mortgaged property to be sold in default of payment being implied within the meaning of S. 58 (b) of the Transfer of Property Act.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH).

Present :—Mr. Justice Benson, Mr. Justice Bhashyam Aiyangar,  
and Mr. Justice Russell.

Bharata Pisharodi ... Appellant\* (*Plaintiff*).

v.

Vasudevan Nambudri and others ... Respondents (*Defendants*).

Act I of 1897, S. 4—Conditional undertaking to promise—Pronote.

Bharata  
Pisharodi  
v.  
Vasudevan  
Nambudri.

When there is no unconditional undertaking on the face of the document and the undertaking is only conditional on the amount being remitted as requested, the document is not a promissory note within the meaning of S. 34 of Act I of 1879.

*Channamma v. Ayyanna*<sup>1</sup> overruled. *Narayanasawmi v. Lokambalammal*<sup>2</sup> and *Bhat Narhari Bhat v. Atmaram Moreshwar*<sup>3</sup> followed.

Where a person wrote a letter to the following effect :—"In addition to Rs. 115 already received Rs. 385 is also required. Please send it by the bearer Srinivasan. The amount will be returned with interest at 12 per cent. without delay." :—

Held, that the letter was not a promissory note.

Second appeal from the decree of the Court of the Subordinate Judge of South Malabar at Palghat in A. S. No. 243 of 1901 presented against the decree of the Court of the District Munsif of Nedunganad in O. S. No. 360 of 1899.

The Court (The Honourable Mr. Justice Subrahmanya Aiyar and the Honourable Mr. Justice Moore) made the following

ORDER OF REFERENCE TO A FULL BENCH :—At the hearing of this second appeal before us a question has been raised as to whether the following letter, dated the 6th November 1896 is a promissory note or not. "In addition to Rs. 115 already received Rs. 385 is also required. Please send it by the bearer Sreenivasan alias Appu taking his acknowledgment below. The amount will be returned with interest at 12 per cent. without

\* S. A. No. 1383 of 1901.

16th October 1903.

1. I. L. R., 16 M. 283 2. I. L. R., 23 M. 156 note. 3. I. L. R., 13 B. 669.

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Nambudri.

delay." The District Munsif and the Subordinate Judge (on appeal) have on the strength of the decision of *Channamma v. Ayyanna*<sup>1</sup> decided that this letter is a pro-note. We dissent from this view and are in favour of the contrary opinion as expressed in the following cases where similar letters are dealt with. *Narayanasami Mudaliar v. Lokambalammal*<sup>2</sup> and *Dhond Bhat Narhar Bhat v. Atmaram Moreshtar*<sup>3</sup>.

As, in our opinion, the case of *Channamma v. Ayyanna*<sup>1</sup> was wrongly decided, we refer for the opinion of a Full Bench the question as to whether the letter set forth in this reference is a promissory note within the meaning of that term as used in S. 34, Act I of 1879.

*J. L. Rosario* for appellant.

*K. P. Govinda Menon* for respondents.

The Court expressed the following

OPINION :—It is brought to our notice, that the words "taking his acknowledgment below" do not exist in the document which gave rise to the reference, and we deal with the question on the footing that these words are not in the document. There is no unconditional undertaking on the face of the document to pay the money. It is clear on the face of the document that the undertaking is conditional on the amount being remitted as requested. The document is, no doubt, similar to that in the case reported in *Channamma v. Ayyanna*<sup>1</sup>, but we are unable to follow that decision. We think that the case reported in the foot-note to 23 M. 156 is correctly decided.

Following that decision and the decision of the Division Bench of three Judges in the case reported in *Dhond v. Atmaram*<sup>3</sup> we are of opinion that the document under reference is not a pro-note within the meaning of that term as used in S. 34, Act I of 1879.

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1. I. L. R., 16 Mad. 283.

2. I. L. R., 23 M. 156 note.

3. I. L. R., 18 B. 669.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH.)

Present :—Mr. Justice Benson, Mr. Justice Bhashyam Aiyangar  
and Mr. Justice Russell.

Chinnipakam Rajagopalachari (deceased)      Appellants\*  
and another.      (*Plaintiff and his  
legal representative.*)  
v.

Lakshmidoss      ...      ...      Respondent  
(*Defendant*).

*Rent Recovery Act, Ss. 2, 14 and 38—Arrear of rent for more than a year—Legality of attachment or distraint.*      Rajagopalachari  
v.  
Lakshmidoss.

An attachment of the tenant's immoveable property or a distraint of the tenant's moveables made by the landlord more than a year from the time rent became due as specified in the patta tendered by the landlord to the tenant would be illegal as being out of time under Ss. 2 and 14 of the Rent Recovery Act.

*Appayasami v. Subba*<sup>1</sup> overruled. *Tayamma v. Kolandavelu*<sup>2</sup> approved.

Rent or any instalment of rent is deemed an arrear according to S. 14 of the Rent Recovery Act if it is not paid on the date on which it is payable according to the terms of the putta or custom although no tender is made prior to the date on which the rent or instalment has become payable, but is postponed to the end of fasli.

Tender is only a condition precedent to the institution of the legal proceedings for the recovery of the arrear of rent, but has not the effect of preventing limitation from running.

Second appeal from the decree of the District Court of Chingleput in A. S. No. 181 of 1900, presented against the decision of the Court of the Deputy Collector of Saidapet Division in S. S. No. 170 of 1900.

The Court (The Honourable Sir S. Subrahmania Aiyar, Officiating Chief Justice, and the Honourable Mr. Justice Boddam) made the following

ORDER OF REFERENCE TO A FULL BENCH :—The question raised in this case is whether an attachment of the plaintiff's immoveable property more than one year from the time when the rent became due as specified in the tendered putta was in time. In the Lower Court it was held to be in time on the authority of *Ap*-

\* S. A. No. 673 of 1901.

16th November 1903.

1. I. L. R., 13 M. 463.

2. I. L. R., 12 M. 485.

Rajagopala-  
chari  
v.  
Lakshmidoss.

*payasami Pillai v. Subba*<sup>1</sup>. This decision appears to have been followed in Second Appeal No. 728 of 1899.

It is urged before us that the reasoning upon which the decision of the case in *Appayasami Pillai v. Subba*<sup>1</sup> rests has been greatly weakened by subsequent decisions, viz., *Sriramulu v. Sobhanadri Appa Row*<sup>2</sup> *Venkatagiri Raja v. Ramasami*<sup>3</sup>, *Kumarasami Pillai v. President, District Board of Tanjore*<sup>4</sup> and see also *Sir Ramasami Mudaliar v. Annadorai Ayyar*.<sup>5</sup>

Moreover the decision in *Appayasami v. Subba*<sup>1</sup> seems hardly consistent with the language of Sections 2 and 14 of the Rent Recovery Act.

If the view in *Appayasami v. Subba*<sup>1</sup> be strictly followed, it would not be easy to hold that a landlord is entitled to distrain moveable property within the fasli even though the rent had become due. There seems to be hardly any ground for holding that a landlord is not entitled in such circumstances to proceed for arrears due to him against moveable property and S. 38 of the Rent Recovery Act would seem to imply that he has such a right.

We therefore refer to a Full Bench the question whether the proceedings against the immoveable property in this case were taken in time within the meaning of S. 2 of the Rent Recovery Act

*T. R. Venkatarama Sastri* for *P. S. Sivaswami Aiyar* for appellants.

*V. C. Seshachariar* for respondent.

The Court expressed the following

OPINION :—Our answer to the question referred for our opinion is that the attachment of the plaintiff's immoveable property which was made more than one year after the date when the rent became due as specified in the puttah tendered, was not within the time limited by S. 2 of the Rent Recovery Act VIII of 1865. The decision reported in *Appayasami Pillai v. Subba*<sup>1</sup> is in direct conflict with the decision in *Thayamma v. Kolandavelu*<sup>6</sup> and we think that the view taken in the latter is correct.

1. I. L. R., 13 M. 463.

2. I. L. R., 19 M. 21.

3. I. L. R., 21 M. 413.

4. I. L. R., 22 M. 248.

5. I. L. R., 25 M. 454.

6. I. L. R., 12 M. 465.

S. 14 makes it perfectly clear that the rent, or any instalment of rent, is deemed an arrear of rent if it is not paid on the date on which it is payable according to the terms of the puttah or custom; and it is not the less an arrear which accrued due on that date because the puttah had not been tendered prior thereto, the tender being postponed to the end of the fasli or revenue year. Such tender is only a condition precedent to the institution of legal proceedings for the recovery of the arrear of rent. Though coercive process against the land is postponed by S. 38 of the Act until the expiration of the Fasli, yet under S. 2 limitation runs from the date when the rent (or instalment of rent) sought to be recovered became an arrear under S. 14.

Rajagopala-  
chari  
v.  
Lakshmidoss.

We may add that no real hardship results from these provisions of the law as instalments do not in practice fall due during the first few months of the fasli, and the landlord has therefore a reasonably sufficient time after the end of the fasli to take proceedings even in regard to the earliest instalment in arrear.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present.—Mr. Justice Subrahmaniam Aiyar and Mr. Justice Boddam.

Naganada Davay and others... Appellants\* (*3rd Defendants*  
v. *Representatives*).  
Bappu Chettiar ... Respondent (*Plaintiff*).

*Contract Act, Ss. 108, 178 and 179—Bailor and bailee—Possession of bailee—Meaning of "possession"—Bailee pawning goods bailed—Rights of bailor.*

Naganada  
Davay  
v.  
Bappu  
Chettiar.

Where a person took some jewels from the owner to be returned to the latter after four days, and after the expiry of the four days the bailee pledged the goods to a third person, the latter is not protected by Ss. 178 and 179 of the Contract Act and the owner may recover the jewels from the pledgee.

Per Boddam J. :—

The protection given to pledgees by Contract Act, S. 178, is the same as that given to buyers under S. 108, Excep. I of the same Act.

The word "Possession" has the same meaning in both sections. It is neither custody, nor mere physical control.

\* S. A. No. 1531 of 1901.

8th September 1903.

Naganada  
Davay  
v.  
Bappu  
Chettiar.

*Biddomayee v. Sitaram*<sup>1</sup> and *Shankar Murlidhar v. Mohanall*<sup>2</sup> referred to.

Jewels in the custody of a wife are not in the "possession" of the wife within the meaning of S. 108, Excep. I and S. 178.

"Possession" of a person having a limited interest is not "possession" within the meaning of S. 178, as that case is specially provided for in S. 179.

The "possession" of a person under a hire purchase agreement is not such a possession as is mentioned in S. 179, even in the absence of the words "notwithstanding instructions of the owner to the contrary."

The word "possession" in S. 108, Excep. I does not include the case of a person in possession under a contract of hire.

Per *Subrahmania Aiyar J* :—

S. 179 of the Contract Act refers to cases where the pawnor has possession which is necessarily traceable to and is an incident of the limited interest he has in the goods pledged. But S. 178 of the Act refers to cases where the pawnor has a document of title to goods or has possession of goods unconnected with and independent of any interest of his in such goods. In the latter case the pawnor can, as one invested with the *symbol* or *indicia* of property, make a valid transfer of the goods under certain circumstances notwithstanding the absence of any interest in the goods.

The possession by a pawnor when such possession is traceable to and is an incident of his right as the hirer of the goods pawned is not such a possession as is contemplated under S. 178 of the Contract Act.

The possession of goods by a factor is not an incident of his interest in the goods, but is directly attributable to his character as agent, whether the agency is one coupled with interest or otherwise.

S. 179 of the Contract Act necessarily implies that the limited interest contemplated therein is such as to make a pledge valid to some extent and not altogether invalid.

A pledge by a person who hired the goods after the termination of the bailment is a conversion for which the owner may maintain an action against the hirer and the pledgee.

Second appeal from the decree of the Subordinate Judge's Court of Negapatam in A.S. No. 580 of 1900, presented against the decree of the Court of the District Munsif of Tanjore in O. S. No. 528 of 1898.

*P. S. Sivaswami Aiyar* for appellant.

*C. Krishnan* for *C. Sankaran Nair* for respondent.

*P. S. Sivaswami Aiyar* for appellant :—Both the Courts have misconstrued S. 178 of the Contract Act. It is found here that the pawnee acted in good faith. Two conditions are to be fulfilled.—(1)

1. I. L. R., 4 C. 497.

2. I. L. R., 11 B. 704.

That the pawnee should act in good faith. (2) That the article itself should not have been originally obtained by means of an offence or fraud. Provided these are fulfilled the pawnee gets a valid title to the extent of the money advanced. Here it is not suggested that the jewel was obtained by offence or fraud. The cases hold that S. 178 applies only to the case of mercantile agents. The earliest case is 12 B. L. R., 42 which is decided under S. 108. There is a marked difference between S. 108 and S. 178. Stress is laid in that case upon the words in S. 108 "notwithstanding any instructions of the owner to the contrary."

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v.  
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Chettiar.

[*Subrahmania Aiyar, J.*—But no instructions to the contrary need be given to a pledgee. But they may have to be given in the case of an agent who may have a power to sell. Therefore the words are necessary in S. 108 while they will be inappropriate in S. 178]. The only question under S. 178 is, is the bailee in possession of the goods? There is nothing to qualify those words. [*Subrahmania Aiyar, J.* There is an indication of the class of cases in the words which follow]. They are all cases of documents which would suggest to a stranger that their possessor is the owner. It simply indicates the class of documents. A bailee is a person in possession of goods. See 1902, P. 42. S. 179 says that you cannot give a pledgee a better interest than you have. If the pledgee is unaware of the extent of the pledgor's interest S. 178 applies. If he is aware, S. 179 applies. The general principle is that no one can convey a better title than he himself has. S. 178 is an exception. S. 179 lays down a general rule. It would have been more artistic to place S. 179 before 178. It is somewhat anomalous to say that a person merely in possession is entitled to make a valid pledge, but if he has also an interest in the goods in addition, he can create a vested pledge only to the extent of his interest. There is absolutely no reason to limit the application of the words of the section to mercantile agents only. The language of the English Factors Act is different from that of S. 178. The case in I. L. R., 8 B. 501 at 508, is a decision upon S. 108. The case in 11 B. 704 is also a case under S. 108. In L. R. 10. C. P. 354 the history of the English Law on the point has been fully considered and dealt with; these cases do not apply to a case under S. 178 the language of which is more general than that of S. 108.



Naganada  
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v.  
Bappu  
Chettiar.

*C. Krishnan* for respondents :—The latest case is 24 B. 458, where the wife was held to be not in possession of it at all. The case in 12 B. L. R., has been accepted there as good law. S. 178 cannot be construed liberally, it being in itself an exceptional provision. Ss. 108 and 178 deal with the same class of persons whoever they may be. [*Subrahmania Aiyar J.*—How would you explain the omission of certain words in S. 178]. In S. 108 the legislators for the first time laid down the law, and they thought it unnecessary to repeat them. In cases where S. 108 will not apply S. 179 will equally not apply.

*P. S. Sivaswami Aiyar* in reply.

The Court delivered the following

JUDGMENTS :—*Boddam, J.*—I think that the protection given to pledgees by S. 178 of the Contract Act is similar to that given to buyers under Exception 1 to S. 108 of the same Act, and that the possession intended is the same in both sections. In interpreting the section the English cases are of no assistance. The meaning of the section must be determined by a consideration of the statute and of the words of the section itself. The word ‘possession’ in the section is clearly not intended to cover all cases in which the goods, etc., are in the physical control of the pledgor because the “possession” in the first part of the section is distinguished from the “custody” of them in the last paragraph of the same section. It has, therefore, been held that goods in the custody of a servant, though they are in his physical possession, cannot be pledged under the section. *Biddomayee Dabee Dabee v. Sitaram* and *Biddomayee Datee Datee v. Soobul Das Mullick*<sup>1</sup> and *Shankar Murlidhar v. Mohanlal Jaduram*<sup>2</sup> and the same has been held to apply to jewels in the custody of a wife. *Seagar v. Hukma Kessa*<sup>3</sup>. Moreover the possession intended is not the possession of a person who has a limited interest, because that case is specially provided for in S. 179.

The word “possession” is also used in S. 108, exception, and though the words in that section are not identical with the words in S. 178, they are very similar and I think that the possession intended is the same. S. 108 contains the words ‘notwithstanding any instructions of the owner to the contrary’, which are not in S. 178, and

1. I. L. R., 4 Cal. 497.      2. I. L. R., 11 B. 704.      3. I. L. R., 24 B. 458.

it has been held continuously ever since 1873 when *Greenwood v. Holquette*<sup>1</sup> was decided that the existence of these words in the section indicate that the possession meant in that section is a possession which is unqualified and not to be restricted otherwise than by the owner giving instructions to the person who has it. The section was, therefore, held not to apply to a person in possession of a piano under a hire purchase agreement, but that the possession intended must be similar to that of a factor or agent. The possession must be such a possession as an owner has, not a qualified possession such as the hirer of goods has, or where the possession is for a specific purpose.

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v.  
Bappa  
Chettiar.  
—  
Boddam, J.

As the word 'possession' in both sections is intended to be restricted, and as the wording of both the sections is so similar, I think the word as used in S. 178 of the Contract Act is intended to have the same meaning as in S. 108, though the words 'notwithstanding any instructions of the owner to the contrary' are not repeated in the former section. In these circumstances the pledgee of a jewel hired is not, in my opinion, protected.

I think, therefore, that the decree of the Subordinate Judge is right and would dismiss this appeal with costs.

*Subrahmanya Aiyar, J.*:—I agree. Ss. 179 and 178 of the Indian Contract Act, which are the only sections bearing on the question under consideration, respectively contemplate mutually exclusive cases. S. 179 refers to certain cases where the pawnor has possession which is necessarily traceable to, and is an incident of a limited interest he has in the goods pledged. On the other hand, S. 178 refers to cases where a pawnor has a document of title to goods or has possession of goods unconnected with, and independent of, any interest of his therein, though as one invested with the symbol or *indicia* of property, he may, notwithstanding the absence of any interest, make a valid transfer of the goods in certain circumstances.

In the present case, the pawnor had, no doubt, possession, but as that possession was traceable to, and was an incident of, his right as the hirer of the jewel for four days, it was not such possession as is contemplated by S. 178. In the course of the argument, Mr. Sivaswami Aiyar referred to the case of a pledge by

1. 12 B.L. R. 42.

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Bappu  
Chettiar.  
—  
Subrahmaniam  
Aiyar, J.

a factor in possession, who has made an advance thereon so as to make his agency one coupled with an interest, in favour of a pawnee acting in good faith and without any reason to believe that the pawnor was making the pledge improperly, as an instance inconsistent with this view.

This argument however reverses the true relation of things and assumes that the possession of the factor in the case supposed is the consequence of his interest, while the fact is the possession is directly attributable to his character as agent—in other words it is attributable to the agency irrespective of whether it is one coupled with an interest or not.

As to S. 179, the language thereof assumes and necessarily implies that the limited interest contemplated therein is such as to make a pledge valid to some extent and not altogether invalid. That, however, is not the case here, for, though the pawnor had a right to retain and use the jewel for the very limited period of four days, yet such right even if it were not merely personal had terminated at the date of the pledge, which was consequently a wholly tortious act—a conversion for which the owner may maintain an action against the hirer as well as the person taking delivery from him. (See Beal on Bailments, pp. 226 and 231). S. 179 also could not therefore apply.

As neither of the provisions of the Contract Act that could be relied on in support of the pledge in question applies, the second appeal fails and must be dismissed with costs.

#### IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Boddam and Mr. Justice Bhashyam Aiyangar.

Palaniappa Chetti... Petitioner\* (*Counter-Petitioner*).

v.

Annamalai Chetti and others. Respondents (*Petitioners*).

Palaniappa  
Chetti  
v.  
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Chetti.

*Criminal Procedure Code, S. 195, Sub-Ss. 1, Cls. (b) and (c), 6 and 7, Cl. (a) and S. 439—Civil Procedure Code Ss. 197, Cl. (a) 622—Village Courts, Act, 1888—Charter Act, S. 15—Penal Code S. 199—Meaning of Court Subordinate—First Court refusing or according sanction—2nd Court setting aside on appeal—Appeal to High Court—True theory as to order by Court of appeal—Affidavit in attachment before judgment—Liability of declarant under S. 199, Penal Code for false statement—Any Court competent to administer oath of declaration to affidavit—Village Munsif, a Court.*

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\* C. M. P. No. 1319 of 1902 and C. B. P. 25 of 1903. 11th September 1903.

An order passed by the court of appeal is in law the order which ought to have been passed by the Subordinate Court and will, therefore, have the same efficacy and operation as the order which ought to have been passed by the latter.

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Chetti  
v.  
Annamalai  
Chetti.

A petition under S. 195, Criminal Procedure Code, by way of appeal lies against the order of a District Judge granting sanction and passed in an appeal preferred from the order of a Subordinate Judge refusing sanction in respect of offences alleged to be committed before the Court of the Subordinate Judge.

Under Sub-S. (6) of S. 195 Criminal Procedure Code, a petition by way of appeal lies to the High Court in every case in which a Civil or Criminal Court subordinate to it within the meaning of Sub-S.7(a) gives or refuses a sanction whether in respect of an offence committed before it or one committed before a Court subordinate to it and, in the latter case, whether it gives a sanction refused by the Subordinate Court or revokes a sanction accorded by such court.

Under Cl. (b) and (c) of Sub-S 1 of S. 195, sanction may be accorded in the first instance by the Court to which the Court in which the offence is committed is 'subordinate' even though no application for sanction has been made to the latter court.

The High Court, in a case in which both the Original Criminal Court and the Appellate Criminal Court refuse a sanction, may, as a Court of Revision, call for the record under S. 439, Criminal Procedure Code, and if the refusal proceeds upon an error of law, the High Court may accord sanction which will be operative for the purposes of clauses (b) and (c) of Sub-S. 1 of S. 195, Criminal Procedure Code.

Where an affidavit in cases in which evidence may be given by affidavit is intended to be used in a judicial proceeding before a Court of Justice and the declarant has made a statement therein that is false to his knowledge touching any point material to the object for which the affidavit is to be used, the declarant will be guilty under S.199, Penal Code.

A Village Munsif is a Judge of the Court of the Village Munsif established under Madras Village Courts Act, 1888.

Any Court may administer the oath of the declaration to an affidavit under S.197 Cl. (a), C. P. C. and, therefore, a Village Munsif can sign the declaration to an affidavit intended to be used in support of an application for attachment before judgment.

A statement made in an affidavit in which the declaration is signed by a Village Munsif may render the declarant liable for, perjury for which sanction may properly be obtained.

Where sanction had been accorded by the Sub-Judge and confirmed by the District Judge, although the High Court might not interfere under S.622, Civil Procedure Code, where the courts below did not act illegally or with material irregularity, yet where the High Court had to consider the subject matter of the sanction upon the merits in connection with another application by way of appeal under S. 195, Criminal Procedure Code, with respect to the sanction of other offences on the same materials and the High Court held that the sanction accorded was not proper, the High Court might, in exercise of the powers vested in them under S. 15 of the Charter Act, set aside the sanction for the offences accorded by both Courts.

Application praying that, in the circumstances stated therein, the High Court will be pleased to set aside the order, passed by the District Judge of Madura in C. M. P. No. 173 of 1902.

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Chetti  
v.  
Annamalai  
Chetti.**

Petition under S. 622 of the Civil Procedure Code and S. 15 of the Charter Act, praying the High Court to revise the order dated 5th November 1902, passed by the District Court of Madura in C. M. P. No. 172 of 1902.

The sanction in this case was refused by the Sub-Court but granted by the District Court.

*V. Krishnaswami Aiyar, P. R. Sundara Aiyar and K. Jagannadha Aiyar* for the petitioner.

*T. Rangachariar* for the respondents.

*T. Rangachariar*:—There is a preliminary objection to the hearing of the petition. According to cl. b of S. 195, the courts whose grant of sanction will invest the criminal court with jurisdiction is either the Sub-Court or the District Court. The sanction by the High Court will be of no avail. The code does not contemplate a second appeal). *Bhashyam Aiyangar J.* That will be so if the two courts below are concurrent ; but not where the lower courts are not concurrent). If under cl. 6 the High Court gives sanction, it will not be valid under cl. b ; when in the case of a conviction itself a second appeal is not given by the Legislature, in the case of a bare sanction a second appeal could not have been contemplated. To read cl. 6 consistently with cl. b, the grant or refusal in cl. 6 should be the original granting or original refusal :—

*V. Krishnaswami Aiyar* for petitioner.

The argument of anomaly will not hold water. There are greater anomalies than this, *e. g.*, Letters Patent appeal is preferable from the decision of a single judge granting or revoking sanction. 26 M. 139 is in point, though it is not a decision on the point. [*Bhashyam Aiyangar, J.* Suppose the High Court as a court of revision grants a sanction whether under S. 622, C. P. C., or 439 Cr. P. C.] S. 439 also says that the High Court can pass any order which an appellate court may pass under S. 195.

*T. Rangachariar*:—The High Court will not pass an original order in revision (*V. Krishnaswami Aiyar*. That is contrary to the very words of S. 439, Cr. P. C.)

[The objection was overruled].

*V. Krishnaswami Aiyar*.—A statement is made in an affidavit for attachment before judgment that the defendant is preparing or attempting to alienate properties. He is examined as a witness before the granting of the application and he says he heard so.

Both should be taken together for the purpose of granting sanction. S. 491, C. P. C., gives power to the court to grant compensation if attachment is obtained on insufficient grounds.

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*T. Rangachariar* for counter-petitioner. The statement has been made because the law requires him to make it. In the affidavit he says that he declares. It would be perjury if he says a thing which he has no reason to believe.

The Court made the following:

ORDER.—In C. M. P. No. 1319 of 1902:—This purports to be a petition presented under S. 195, Criminal Procedure Code, praying for the revocation of a sanction given by the District Judge of Madura for the prosecution of the petitioner for alleged offences under Ss. 193, 196 and 200 of the Indian Penal Code, which sanction had been refused by the Subordinate Judge's Court of Madura (East), in which it is alleged that the offences were committed. The respondents' pleader takes the preliminary objection that no petition lies to this Court under S. 195, Criminal Procedure Code, inasmuch as the application for sanction has been considered and dealt with both by the Subordinate Judge's Court and the District Court, to which alone the Subordinate Judge's Court is subordinate within the meaning of Sub-S. 7 (a) of S. 195, Criminal Procedure Code. Taking the converse of the present case, *viz.*, a case of sanction having been given by the Subordinate Judge's Court, and the same being revoked by the District Court under Sub-S. (6), he argues that the sanction prescribed by clauses (b) and (c) of Sub-S. (1) is a sanction to be accorded either by the court in which the offence was committed or by the Court to which such court is 'subordinate' within the meaning of Sub-S. 7 (a), that therefore a sanction accorded by the High Court in cases in which the offence was committed in a court not subordinate to it within the meaning of Sub-S. 7 (a) will be inoperative, that Sub-S. (b) is controlled by clauses (b) and (c) of Sub-S. (1), and that it should therefore be held that Sub-S. (6) does not contemplate a petition by way of appeal to the High Court in such cases. If this contention were well founded, it would no doubt follow that a petition to the High Court would not be under Sub-S. (b) in the present case, simply because the relief sought is the revocation of a sanction accorded by the District Court and not the granting of a sanction refused by the District Court. We are clearly of opinion that the argument advanced on behalf of the respondents is untenable,

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and that under Sub-S. (6) a petition by way of appeal lies to the High Court in every case in which a civil or criminal court subordinate to it within the meaning of Sub-S. 7 (a) gives or refuses a sanction whether in respect of an offence committed before it, or of one committed before a Court subordinate to it, and in the latter case, whether it gives a sanction refused by the Subordinate Court or revokes a sanction accorded by such court. Under clauses (b) and (c) of Sub-S. (1) the sanction may be accorded in the first instance by the court to which the court in which the offence was committed is subordinate even though no application for sanction has been made to the latter court. The contention that for purposes of clauses (b) and (c) of Sub-S. (1) a sanction accorded by the High Court would not operate as a sanction accorded by a court subordinate to it, *viz.*, the District Court, is manifestly untenable and proceeds on a misapprehension of the jurisdiction exercised by an appellate tribunal. An order passed by the Court of appeal is in law the order which ought to have been passed by the Subordinate Court, and will therefore have the same efficacy and operation as the order which ought to have been passed by the latter. A reference to S. 439 of the Code of Criminal Procedure places the matter beyond all doubt. That section expressly provides among other things that the High Court as a court of revision may exercise the powers conferred on a court of appeal by S. 195. In a case in which both the original criminal court and the appellate criminal court refuse a sanction, the High Court as a court of revision may call for the record and if the refusal proceeds on an error of law, it may accord the sanction which ought to have been granted by the appellate criminal court, and such sanction will of course be operative for purposes of clauses (b) and (c) of Sub-S. 1. We therefore overrule the preliminary objection and proceed to dispose of the petition on the merits.

The petitioner in a suit brought by him for about 2 lakhs of rupees against the respondents and others applied under S. 483, Civil Procedure Code, for an attachment before judgment, and in an affidavit which was filed in support of the petition, he declared that the defendants 1 to 11 without having good intention, but with bad intention, were attempting to dispose of the immoveable properties belonging to them by alienation or otherwise. The petitioner was examined *viva voce* in support of his petition and

deposed in his examination-in-chief that the defendants were, he heard, going to alienate their immoveable properties and in cross-examination stated that he knew this only from hearsay but could not remember the names of the persons who said so. The petition was dismissed. This application for sanction to prosecute was then brought and the Subordinate Judge granted sanction only for an offence under S. 199, Indian Penal Code, and refused sanction for offences under Ss. 193, 196 and 200 of the Indian Penal Code, for reasons which it is unnecessary to go into. The sanction was not based upon any statement made by the petitioner in his oral evidence but upon the abovementioned declaration made by him in his affidavit. The respondents preferred an appeal to the District Judge under S. 195, Criminal Procedure Code, against the refusal of the Subordinate Judge to accord sanction under Ss. 193, 196 and 200, Indian Penal Code. The District Judge holding that a Village Magistrate is a Magistrate within the meaning of clause (a) of S. 197, Civil Procedure Code, accorded sanction for the prosecution of the petitioner also under the above sections of the Indian Penal Code.

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We are clearly of opinion that the District Judge did not exercise a sound discretion in according sanction for the prosecution of the petitioner. Although in his affidavit he did not state that he based his statement made therein upon hearsay, yet the declaration in his affidavit is not inconsistent with his having based it upon hearsay, and in his examination as a witness he clearly stated in his examination-in-chief itself that his statement was based upon hearsay and the sanction sought for and accorded is not for having falsely deposed as a witness. The interests at stake in the suit were considerable and there is nothing whatever on the record to show that he acted dishonestly in applying for attachment before judgment, and we do not think that the ends of justice demand that he should be prosecuted for the statement he made in his affidavit which statement, it is clear, he made only on hearsay.

We therefore set aside the sanction granted, by the District Judge, for offences under Ss. 193, 196 and 200 of the Indian Penal Code.

*C. B. P. No. 25 of 1903.*

This is a petition to set aside the sanction granted by the Subordinate Judge of Madura (East) for the prosecution of the



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petitioner under S. 199 of the Indian Penal Code which sanction was affirmed by the District Judge.

It is needless to repeat the facts which led up to this sanction as they have already been stated in our Judgment in C. M. P. No. 1319 of 1902.

It is unnecessary to consider and decide whether as held by the District Judge a Village Magistrate in this Presidency is or is not a Magistrate within the meaning of S. 197, clause (a), Civil Procedure Code as that expression is defined in the Imperial General Clauses Act (Act I of 1868 and Act X of 1897) for we find that the affidavit in question was sworn to before a Village Munsif who perhaps is also a Village Magistrate and the expression (Village Munsif) is defined in the Madras Village Courts Act 1888 as the Judge of the Court of a Village Munsif established under that Act and under clause (a) of S. 197 of the Civil Procedure Code "any court may administer the oath of the declaration to an affidavit." Under Ss. 195 and 483 Civil Procedure Code, evidence may be given by affidavit in support of an application for attachment before Judgment and if such affidavit is intended to be used in a judicial proceeding before a Court of Justice and the declarant has made a statement therein that is false to his knowledge, touching any point material to the object for which the affidavit is to be used the declarant will be guilty of an offence under S. 199, Indian Penal Code. We cannot therefore hold the courts below acted illegally or with material irregularity in the exercise of their jurisdiction within the meaning of S. 622, Civil Procedure Code, in granting and upholding the sanction for an offence under S. 199, Indian Penal Code and if the matter to which the sanction relates had not come before us on its merits in C. M. P. No. 1319 of 1902 in which we have just held that the case was one in which sanction for a criminal prosecution ought not to have been granted, we should have simply rejected this petition and should not have thought it necessary to exercise the extraordinary power of superintendence conferred on this court by S. 15 of the Charter Act.

As, however, we have already had to quash the sanction accorded in the same matter though under different sections of the Indian Penal Code, we think it right and proper that in this case also, in exercise of our powers under S. 15 of the Charter Act, we should set aside the sanction granted and we accordingly do so.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson, Mr. Justice Bhashyam Aiyangar  
and Mr. Justice Russell.

(FULL BENCH).

Nellayappa Pillaiyan and others ... Appellants\* (*Defendants*).

v.

Ambalavana Pandara Sannadhi ... Respondent (*Plaintiff*).

*Rent Recovery Act, Ss. 3 and 612—Surrender of tenancy—Intermediate landholder.*

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S. 12 of the Rent Recovery Act does not apply to a person who is in the position of an intermediate landholder who though paying rent to a superior landlord under an arrangement which amounts to a lease in perpetuity or for a term of years receives rent in turn from his tenants.

*Appasami v. Ramasubba<sup>1</sup> Subbaraya v. Srinivasa<sup>2</sup> Baskarasami v. Sivasami<sup>3</sup> and Ramchandra v. Narayanasami<sup>4</sup> overruled. Ramasami v. Bhaskarasami<sup>5</sup> and Lakshmi-narayana Pantulu v. Venkatarayanam<sup>6</sup> followed.*

The lessees of a melvaram are farmers under an Inamdar and belong to the class of landholders specified in S. 3 of the Rent Recovery Act.

Second Appeal from the decree of the Subordinate Judge's Court at Tinnevely in Appeal Suit No. 205 of 1900, presented against the decree of the District Munsif's Court of Ambasamudram in O. S. No. 125 of 1899.

The Court (the Officiating Chief Justice and Mr. Justice Russell) made the following

ORDER OF REFERENCE TO A FULL BENCH:—According to Exhibits A and 11 the arrangement between the parties is a permanent lease of the plaintiff's melvaram right to the defendants. One of the questions raised in the case is whether the defendants are tenants entitled to relinquish under the proviso to section 12 of Madras Act VIII of 1865. There is a conflict on this point between the decisions in *Subbaraya v. Srinivasa<sup>2</sup>* and *Krishna v. Lakshminaranappa<sup>7</sup>*. In the former a lessee in the position of the present defendants was held to come within the provisions of section 12 of the Act. In *Krishna v. Lakshminaranappa<sup>7</sup>* a mulgeni tenant was held not entitled to relinquish, one of the grounds being that section 12 did not apply to the case of such a

S. A. No. 167 of 1902.

7th December 1903.

1. I. L. R., 7 M. 262.

3. I. L. R., 8 M. 196.

5. I. L. R., 3 M. 67.

2. I. L. R., 7 M. 580.

4. I. L. R., 10 M. 229.

6. I. L. R., 21 M. 116.

7. I. L. R., 15 M. 67.

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tenant. Owing to the conflict we consider it necessary to refer for the decision of a Full Bench the following question :—

Are the defendants entitled to relinquish under section 12 of Act VIII of 1865 their interest under Exhibit A ?

*P. R. Sundara Aiyar* for appellants.

*V. Krishnasawami Aiyar* for respondent.

*P. R. Sundra Aiyar for appellant:*— The question is whether an intermediate holder can relinquish his holding to his overlord ? (*Benson, J.* Is there any authority?). There is, 7 M. 580 (*Bhashyam Aiyangar, J.* That is not directly on this point. The reasoning may apply). I contend that the proviso to S. 12 authorises me to relinquish. (*Benson, J.* The tenant may relinquish. Are you not a landlord within S. 3 ?) That may be. The plaintiff is certainly a landlord. I am a tenant because I pay rent to him. (*Russell, J.* What is rent?) What a lessee pays to lessor. See Transfer of Property Act. That I am a lessee is clear. (*Russell, J.* Are you a tenant bound to exchange patta and muchilika with your landlord?). We have dispensed with the exchange after 1886. Before that we were exchanging pattas and muchilika. In law I am not bound. See 21 M. 116. S. 3 refers to exchange. With-in that section I am not a tenant. S. 4 refers to terms of patta. S. 5 says that nothing more should be levied. Ss. 6, 7, 8, 9, 10 don't apply to Inamdars. S. 12 refers to Ss. 10 and 41. S. 10 does not apply. S. 41 will apply to my case. Even if it did not, the proviso is wider. Ss. 3 to 11 deal with cultivating tenants and landlords above them. S. 13 applies to the second class of landlords under S. 2. Where a ryotwar holder has a lessee under him and takes an instrument from him, he can proceed to distrain. S. 14 contains an indication against me because crops won't exist in the case of the kind of lessee I mention. The explanation will be either that the section does not show that such crops will invariably exist or that the lien of the lessee on the crops may be spoken of as crops. S. 41 states that in the absence of sufficient distress or attachable interest the landlord may enter upon the *premise* and take possession. S. 73 also speaks of *occupancy*. These may seem to be against my view. But S. 12 proviso is wider. (*Bhashyam Aiyangar, J.* I would confine it to the classes of people referred to in the previous clause). The occupancy tenants can relinquish to the landlord under whom they hold. (*Russell, J.* That

need not be under S. 12. *Bhashyam Aiyangar, J.* That will depend on custom.) No. The existence of the right in ryotwari tracts is a reason to construe S. 12 widely. Then the only proper definition of tenant is that which I understand. (*Bhashyam Aiyangar, J.* No. How I read it is this. *Tenant* is one who pays rent to a landlord but who is not himself a landlord as defined before). Those words don't appear. There is no reason to suppose that a tenant with or without occupancy should not have relinquishment. That makes a wide construction of S. 12 probable. That is not without analogy. See 2 M. 67 where proviso to S. 11 was considered applicable to other tenants. (*Bhashyam Aiyangar, J.* They did not express any opinion. Anyhow there is no reason to construe S. 12 widely. Speaking for myself though it is not necessary in this case, if a Zemindar gives a lease for a term of waste or pannai lands on special terms and not on merely customary tenure, there may be no right of relinquishment). That comes to this, that tenants with rights of occupancy can relinquish. (*Bhashyam Aiyangar, J.* I don't say that. I say that the proviso was intended to apply to customary tenures as in Zamindari—to the kind of tenants who were dealt with in 20 M. 299 and 23 M. 319). The Regulation XXX of 1802 S. 8, and Reg. V. of 1822, S. 8, are in terms which support my construction. (*Bhashyam Aiyangar, J.* That goes against the decision of the P. C. or at any rate the decision of the F. B. in 21 M. 116). Coming to the cases, 7 M. 580 held that a farmer can claim reinstatement on ejectment under S. 12. 7 M. 262 held Inamdar a tenant. See also 8 M. 196, 10 M. 229, 16 M. 40, (15 M. 67 *contra*). (*Bhashyam Aiyangar, J.* Your contention is that the only consistent view is to hold that there can be no distraint, no ejectment, against an intermediate holder and that S. 13 should also be limited to ryots and their cultivating tenants). That would be so if S. 12 is not to apply to this case. (*Bhashyam Aiyangar, J.* That result represents the correct view).

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*V. Krishnaswami Aiyar* for the respondent was not called upon.

The Court expressed the following

OPINION :—The reference states the defendants are permanent lessees of the melvaram rights of the plaintiff who is a Zemindar. Although the defendants are the “tenants” of the plaintiff in the

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sense that they are bound to pay rent to the plaintiff, yet the defendants are obviously, we think, not tenants in the sense in which that word is used in section 12 of the Act. The defendants being lessees of the melvaram are farmers under an Inamdari and belong to the class of landholders specified in S. 3 of the Act. Ss. 3 to 12 inclusive refer to the relations between these landholders and their tenants. For the purposes of S. 12, the defendants are not in the position of tenants, but of landlords. The proviso in S. 12 embodies the common law rule with regard to tenants (ryots) holding under the landholders named in S. 3, but was not intended to apply to persons who like the defendants are landholders though bound themselves to pay rent to a superior landlord for a term of years or in perpetuity under a lease.

This decision is in accordance with the views of the Full Bench in *Lakshminarayana Pantulu v. Venkatarayanam*<sup>1</sup> and of the Privy Council in *Ramasami v. Bhaskarasami*<sup>2</sup>.

We think that the view taken in *Subbaraya v. Srinivasa*<sup>3</sup>, relating to the reinstatement of an intermediate landholder who was ejected by a superior landholder and the decisions in *Appasami v. Ramasubba*<sup>4</sup> and *Ramachandra v. Narayanasami*<sup>5</sup>, relating to distraints by a superior landholder for recovery of rent due by an intermediate landholder, and also the decision in *Baskarasami v. Sivasami*<sup>6</sup>, relating to a sale by a superior landholder for sale of the tenure of an intermediate landholder, so far as they proceed on the supposition that the word "tenant" as defined in S. 1 of the Act is applicable to an intermediate landholder who has to pay rent to a superior landholder, are erroneous.

#### IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson, Mr. Justice Bhashyam Aiyangar and Mr. Justice Russell.

(FULL BENCH).

Periasami  
Mudaliar  
v.  
Seetharama  
Chettiar

Periasami Mudaliar and another .. Appellants\* (3rd & 4th Defts.)  
v.

T. Seetharama Chettiar and others. Respondents (Plaintiffs).

*Hindu Law—Judgment-debt—Debt created by judgment—Not same as debt arising from original transaction.*

A judgment obtained against the father creates a debt against the latter by its own force and independently of the debt arising from the original transaction

\* S. A. No. 49 of 1902.

7th December 1903.

1. I. L. R., 21 M. 116.

3. I. L. R., 7 M. 580.

5. I. L. R., 10 M. 229.

2. I. L. R., 2 M. 67.

4. I. L. R., 7 M. 262.

6. I. L. R., 8 M. 196.

and there is a pious obligation on the part of the son to discharge such judgment-debt unless it is illegal or immoral.

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A suit by the creditor to enforce as against the son the debt created by a judgment obtained against the father is not "a suit upon a judgment" and is governed by Art. 120 and not Art. 122 of the Limitation Act.

*Per Bhashyam Aiyangar J.*:—A son is not personally liable for debts incurred by the father. His interest, however, in the joint family property is liable for the same during the father's life-time. But if the father should die before attachment, the son cannot be proceeded against in execution with reference to the joint family property though it will be otherwise with reference to the father's self-acquisition. The joint family property cannot also be proceeded against in execution in a case where the suit is brought against the father who dies pending the same and continued against the son as the father's legal representative.

During the life-time of the father, the creditor cannot bring a suit against the son only for a debt due by the father but the son may be joined as a party defendant in a suit brought against the father.

The son cannot contend in execution that the father's debt is illegal or immoral.

Second Appeal from the decree of the Subordinate Judge's Court of Bellary and Salem at Salem in A. S. No. 186 of 1901 presented against the decree of the Court of the District Munsif of Salem in O. S. No. 700 of 1899.

The facts are sufficiently set forth in the order of reference.

The Court (*Subrahmania Aiyar* and *Boddam, JJ.*) made the following

**ORDER OF REFERENCE TO A FULL BENCH**:—The present suit is for the recovery of money which in the first instance became due in respect of the purchase of certain goods. The purchases were made (speaking generally for the purposes of this case) in September 1894.

On the 12th November 1896 the plaintiffs obtained a decree against the father of the appellants alone. He died in 1897.

On proceeding to execute the decree against the family property in the possession of the appellants and other members of the family execution was refused.

The plaintiffs thereupon instituted the present suit on the 25th September 1899 against the undivided brothers of the deceased and his sons the appellants. As against the former the suit was

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dismissed, but the claim was decreed against the appellants in the Lower Appellate Court.

The main question is whether the suit is in time.

The plaint after referring to the original purchase and the subsequent proceedings including the obtaining of the decree, treats the cause of action as having arisen on the date of the decree.

If in a case like the present the cause of action is to be taken as having arisen on the date of the original purchase, the question of limitation will depend upon which article of the Limitation Act applies to the case. In a suit as against the father undoubtedly Art. 52 would have applied. It is contended that that article would not apply here and that Art. 120 is the only article applicable. *Natasuyan v. Ponnusami*<sup>1</sup>, *Ramayya v. Venkataratnam*<sup>2</sup>, and *Narsingh Misra v. Lalji Misra*<sup>3</sup>, lay down that the latter article applies.

A. A. O. No. 14 of 1900 decides the contrary and lays down in effect that the article applicable is that which would have applied to the suit against the father himself.

A further question which arises with reference to the question of limitation is whether Exhibit R which was a petition put in on behalf of the defendants by their vakil (one of the major defendants being described therein as the appellant's guardian, he, however, not having been appointed under the Guardians and Wards Act) in the course of the execution proceedings on the decree against the father after his death operates as an acknowledgment within S. 19 of the Limitation Act as against the appellants who are minors.

In *Sothanadri Appa Rau v. Sriramulu*<sup>4</sup>, it was held that it was competent to a mother not appointed under any Act as guardian of her minor child to bind her child by acknowledging a debt on the part of the minor, provided that it is not barred by limitation at the date of such acknowledgment.

In *Annapagauda v. Sangadigapa*<sup>5</sup>, it was held that a guardian appointed under the Guardian and Wards Act can sign an

1. I. L. R., 16 M. 99.

4. I. L. R., 17 M. 221.

2. 17 M. 122.

3. 23 All. 206.

5. I. L. R., 26 Bom. 221.

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acknowledgment of liability in respect of, or pay part of the principal of, a debt, so as to extend the period of limitation against his ward in accordance with Ss. 19 and 20 of the Limitation Act, provided it be shown in each case that the guardian's act was for the protection or benefit of the ward's property. Whether in the case of a person not appointed as a guardian under the Guardian and Wards Act the *proviso* in the Bombay case would be held necessary does not appear to have been decided.

On the other hand it has been held in *Wajibun v. Kadir Buksh*<sup>1</sup>, that a mother as natural guardian of her child has no authority to make an acknowledgment on behalf of the minor so as to give a fresh start for limitation.

As to the contention that the cause of action is to be taken as arising on the date of the decree—that is to say if the right sued upon is not the original sale but a right created by the decree—it was urged that in circumstances like the present it is not open to the plaintiffs to found a cause of action on the decree. This has not been definitely considered and decided so far as we are aware although the case in *Ramayya v. Venkataratnam*<sup>2</sup> would seem to support this view.

Having regard to the importance of the questions involved and the conflict of authorities we refer for the consideration of the Full Bench the following questions :—

Whether independently of the alleged debt arising from the original transaction, the decree against the father by its own force creates a debt as against him, which his sons, according to the Hindu Law, are under an obligation to discharge, unless they show that such debt was illegal or immoral.

What is the article of the Indian Limitation Act applicable to the suit against the son either upon the original debt or on the debt, if any, arising from the decree ?

Whether a petition presented and signed by a Vakil appointed on behalf of a minor representative of a deceased judgment-debtor by his natural guardian, in which there is an acknowledgment the debt, is, within the meaning of S. 19 of the Indian Limitation Act, an acknowledgment which would give a starting point against the minor.

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1. I. L. R., 13 C. 292.

2. I. L. R., 17 M. 122.



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*Joseph Satya Nadar* for appellants.

*R. Subramania Aiyar* for respondents.

*Joseph Satya Nadar* for appellant :—The first is a question of limitation. On this point I may draw attention to a petition put in during the pendency of the execution petition asking for time for the payment of the debt. If that petition operates as acknowledgment the suit may be in time. Otherwise the suit is barred as it is more than 3 years from the date of the debt. (*Bhashyam Aiyangar, J.* If the cause of action arose on the decree?) Then it would not be barred. But there is but one cause of action which arose on the date when it arose against the father. (*Bhashyam Aiyangar, J.* Debts may arise by an order of the sovereign directing payment. That order creates a debt for which the son will be liable. Take a decree for costs. We need not take fines because the Hindu Law exempts the son from liability for the fines of the father). The decree is not executable against the son. The decree as decree is not binding. He has to bring another suit on the original cause of action. (*Bhashyam Aiyangar, J.* That is the result of the processual law. Why can he not elect to sue either upon the original debt, or upon the debt of record created by the judgment of the Court?). The authorities show that the only cause of action he has against the son arises at the same time as against the father. (*Bhashyam Aiyangar, J.* In English Law a suit can be brought against the judgment-debtor upon a judgment for a definite sum). That would lead to endless litigation. In this country it will not be permitted. (*Bhashyam Aiyangar, J.* That is because of S. 244. Where S. 244 does not bar the suit it will still lie. If as in Bombay the decree against the father is executable under S. 244 against ancestral property in the son's hand after father's death, then this suit is barred by S. 244). It was held at one time that the cause of action arose only after the father's death, (*Bhashyam Aiyangar, J.* That was so under the Hindu Law. That is the ground on which the father was permitted to sell the son's share so as to save him from prospective liability. The Courts also exercised the power of sale on his behalf on that ground). I shall place before the Court all authorities which lay down that there is only one cause of action (*Bhashyam Aiyangar, J.* I don't say that the suit is strictly upon judgment because the cause of action against the son has not merged in the decree and also because all judgments

are not binding. The son can show that the judgment-debt is not binding on the ground of the immorality or illegality or non-existence of the debt. I don't yet understand what is the illegality or immorality of a debt which does not bind the son, but will bind the father himself. However the son can show that, whatever that is). There are no suits upon judgments heard of here. (*Bhashyam Aiyangar, J.* There are many cases of suits upon judgments. If the decree was of the Agent's Court at Vizagapatam, a suit will lie upon the judgment). I may refer to 10 M. L. J., 248 and 23 M. 292, which lay down that the cause of action arose only on the date of the original debt. (*Bhashyam Aiyangar, J.* The observation in 23 M. 292 is right because technically it is not a suit on judgment.) Their Lordships ruled in 23 M., 292 that there was but one cause of action against the son, not two, one before father's death and another after his death. (*Bhashyam Aiyangar, J.* That is upon the original debt. They don't refer to decree-debts and the cause of action arising therefrom.) 22 M. 49 lays down the same thing (*Bhashyam Aiyangar, J.* Take this case. Suppose the father and his creditor submitted their disputes to arbitration and an award was passed. What then is the cause of action against the son?). An award can be filed and a decree obtained within the time fixed by the Limitation Act. No such procedure can be adopted in the case of decrees of Courts. (*Bhashyam Aiyangar, J.* Take the case of a suit against the father as trustee and a decree is given against him. It may not be executable, but why not a suit be brought?). I submit no such suit can be brought. If we go back to the origin of the suit, the son is not liable at all (*Bhashyam Aiyangar, J.* That is the mistake committed in these cases. The liability is not on the original cause of action, but for the father's debt under the decree). Is it not open to the sons to show that the debt was not as much as the decree against the father states it to be?

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The next question is, what is the article applicable to suits upon the original cause of action or upon the decree debt? On the first view Art. 62 applies. (*Bhashyam Aiyangar, J.* If it is strictly a suit on judgment, Art. 122 will apply. If it is not, Art. 120 will apply. Is there any article for recovery of debts of record?). No article except 122. (*Bhashyam Aiyangar, J.* It may

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be Art. 120, as where the decree directs the father to pay on a future date).

The period is only 3 years from the date of the original cause of action. 10 M. L. J. 248. To hold that the period of limitation is 3 years against the father and 6 years against the son, will land us in very anomalous consequences.

As to the acknowledgment, *see* 26 B. 221, 20 B. 61, 26 C. 51. (*Bhashyam Aiyangar*, J. Can a minor appoint a guardian?). He cannot. (*Bhashyam Aiyangar*, J. The Bombay High Court hold that if the acknowledgment is beneficial to the minor, he is an agent under S. 19 of the Limitation Act). That is in 26 B. 221 F. B. In 20 B. 61 and 26 C. 61, it has been held that a guardian is not an agent. In 10 C. L. R. 377, P. C. lay down that the guardian had no business to bind the minor by acknowledgment. (*Bhashyam Aiyangar*, J. You must not import Hindu Law in the construction of the Act.)

*R. Subramania Aiyar* for respondent. — Judgment upon a debt creates a fresh cause of action. (*Russell* J. What is the cause of action given in the plaint?). The cessation of the execution proceedings is given. All the necessary facts are stated. The decree was stated to be the starting point before the Division Bench (*Bhashyam Aiyangar*, J. No plaint ever states the cause of action correctly. *Russell*, J. When did the idea originate?). It was put forward in the lower courts also, but the judgments don't proceed on that ground. A suit upon a judgment-debt or a debt of record may be maintained. *See* Leake On Contracts, pp. 80, 104 and 106. (*Russell*, J. How do you apply it to this country?) Where the decree is not executable under S. 244, and S. 244 which bars a fresh suit is not applicable, a suit will lie even here. It appears from the provisions of English Law, a suit will be upon a judgment except upon judgment of county courts. (*Bhashyam Aiyangar*, J. Agent's decrees cannot be transferred to regular courts. You can only bring a suit upon the judgment of the Agent?) It will be seen that there are cases of damages, etc., where a debt is created for the first time by the judgment. (*Russell*, J. The cases hold that the only cause of action against the son is the original debt, *See* 23 M. 292.) Upon the original debt there is but one cause of action.

The cause of action on the decree was not considered. (*Bhashyam Aiyangar*, J. There is now a provision in the Pres. S. C. C., Act that no suit should be brought on the decree). S. 94 of the Act provides so. Before the Act suits were being brought upon the decree of the Small Cause Court. I shall refer to those cases to show that decrees did create debts (*Russell J.* Of what use is it now when suits cannot be brought on judgment?). To show that the decree creates a fresh debt which, though executable against the father, can be enforced against sons only by suit. (*Bhashyam Aiyangar*, J. The judgment against father is filed to show the existence of the debt against the father under S. 44, Evidence Act, and the son is made liable for the father's debt evidenced by it.) For suits upon decree-debts, see 8 B. 1, 6 B. H. C. 231, 4 M. Jurist 127, 7 C. 74, 6 M. 1 P. C. (*Bhashyam Aiyangar*, J. The Judgment in 6 M. 1 speaks of the son as representative). No, it treats the property as ancestral and P. C. hold that the son was liable for the debt created by the decree against the father. In 11 M. 413, where execution was held impossible, the Judges say that a suit will lie to enforce the son's liability for balance of judgment-debt. In 16 M. 99 and 17 M. 112 the Judges held that the original debts merged in the decree, but the further observation of their Lordships that the father's death gave a fresh cause of action has now been overruled. These cases show that the decree does give a cause of action.

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I contend that upon the debt the period of limitation is 6 years against the son and 3 years against the father. (*Russell*, J. What is the article?) Art. 120. (*Bhashyam Aiyangar*, J. Then the son will be liable even after this debt is barred against the father). If there is no debt against father, there is none against son. (*Bhashyam Aiyangar*, J. Why do you give a different period against sons any more than against representatives and sureties?). That view is taken in 16 M. 99, 17 M. 122. (*Russell*, J. They are overruled). Not as to period of limitation (*Russell J.* Their view as to the nature of the obligation is no longer correct). 23 A. 206 takes the same view, though as to starting point they dissent from 16 M. and 17 M. It gives good reason for holding Art. 120 applicable (*Bhashyam Aiyangar*, J. Why is the article for a suit on a bond not applicable)? Because the borrower alone is liable under that

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Article. (*Bhashyam Aiyangar*, J. Why so? The Limitation Act does not say so and the suit is upon the father's bond and their liability is the result of the substantive law) 12 M. 139 decides that the son's liability does not arise on a contract. See 23 Q. B. D. 316.

In 4 M. 1 the son's liability is treated as a part of the law of inheritance (*Bhashyam Aiyangar*, J. The law of inheritance makes sons liable for father's contract.)

As to acknowledgment, see S. 19 & 20 of the Limitation Act (Payment by receiver is payment by agent. See *Darby and Bos.*, p. 142, 3 & 4 Wil. IV. Ch. 27, S. 40 and *Chinnery v. Evans* 11 E. R. 1231.

In 26 B., 221, the court followed the House of Lords case, and discussed the later authorities in England and also Indian authorities. (*Bhashyam Aiyangar*, J. What about the acknowledgment of natural guardian?). That is put on the same footing as the power of the guardian appointed under the Act. The Judges hold that the binding nature of the Act depends on whether the guardian acted for the benefit of the minor. (*Bhashyam Aiyangar*, J. What is the benefit test? The guardian is an agent under S. 19 if he made the acknowledgment after pressure from the creditor; otherwise not. That would be importing Hindu Law in the construction of a statute). 17 M. 221 lays down the law. (*Bhashyam Aiyangar*, J. That is a renewal of a debt and its validity will be tested by the doctrine of benefit). This decision and the case in 5 M. 169 F. B. show that if he can bind by renewing debts, he can acknowledge also. See also 18 M. 456. (*Bhashyam Aiyangar*, J. The renewal depends upon the law of contracts, but acknowledgment is a creature of the Limitation Act. The acknowledgment is not by the guardian but by the Vakil. How is that within the rulings quoted?). The Vakil was appointed to ask for time. He prays for time, promising to pay the decree debt within such time.

Vakil's petition may be an acknowledgment. See 8 C. 716, 3 A. 246. (*Bhashyam Aiyangar*, J. The words "duly authorised in this behalf" are not in the English Statute). No, but the law will be the same without those words.

*Joseph Satya Nadar* in reply: suit will not lie on the decree. See 4 M. 1, 5 M. 37 and 22 M. 49. (*Bhashyam Aiyangar*, J. What do you say to the H. L. case. Why is not the Vakil's act binding ?) Because he is not the guardian appointed by the Court.

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The Court expressed the following

OPINIONS:—BENSON J.—With regard to the first question referred for our decision, it is difficult to see on what principle a judgment-debt due by a father should be less the subject of a pious obligation on the part of his son than any other debt due by the father. That the debt is not the same as the original debt seems clear. It may, in fact, be more, or it may be less. Even though it be more than the original debt the father by virtue of the judgment is bound to discharge it. A judgment of a competent court creates a duty on the part of the father to discharge the sum decreed, and there is no reason why such a debt should be excepted from the rule of Hindu Law which imposes a pious obligation on the son to discharge his father's debts, provided they were not incurred for what are technically described as immoral or illegal purposes.

I would, therefore, answer the first question in the affirmative.

As regards the second question, if the suit had been brought on the original cause of action the article of limitation applicable would have been the same as against the father, *i. e.*, Art. 52; but as the suit has been brought on the cause of action arising from the decree against the father, the article applicable is 120. Art. 122 has, in my opinion, no application, for the suit is not, in any view, "a suit upon a judgment". It is a suit to enforce a son's pious obligation under the Hindu Law to discharge his father's debt. There is therefore no bar by limitation and there is no necessity to answer the third question in the reference.

BHASHYAM AIYANGAR, J.—Before answering the 1st and 2nd questions referred to the Full Bench for its opinion it is desirable to state succinctly the substance of the course of judicial decisions defining the obligation of a son, under the Hindu Law, to discharge

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debts incurred by his father. It has now been clearly established that though the son is not personally liable for such debts—either during or after the life-time of the father—yet his interest and share in the joint family property belonging to himself and his father is equally with the father's share and interest in such property, liable for the father's debts during his life-time; and after his death the entire joint family property in the hands of the son is liable for the same. Such liability however does not attach to the son's share in the joint family property during the father's life time or to any portion of the joint family property in the hands of the son, after the father's death, if the father's debt be one of the specified classes excepted by the Hindu Law, such exceptions being generally referred to in judicial decisions—though not very accurately—as illegal or immoral debts. If the father alienates joint family property for the discharge of a debt—not illegal or immoral—due by him, or if such property is sold in discharge of such debt in execution of a decree passed against the father, the voluntary alienation or execution sale will bind the son's interest also in the property alienated or sold though he was not a party to the alienation or decree. If, however, the son has not joined in an alienation by the father or if a sale takes place in execution of a decree passed against the father only, it will be open to the son to contend that the alienation or sale does not affect his interest in the joint-family property by showing that the debt in question of his father was one contracted or incurred by him for an illegal or immoral purpose and as such is not binding upon him.

Though during the father's life-time the suit could not be brought against the son only, for recovery of a debt due by the father, yet the son may be joined as a party defendant in a suit brought against the father and if the plaintiff succeeds in the suit against both the father and the son, a sale of joint family property which takes place in execution of such decree will bind the son also—though such decree cannot be executed against him personally—and he will be precluded from bringing a suit to contest the sale on the ground that the debt was incurred for an illegal or immoral purpose—a plea which, if well founded, he ought to have advanced and established in the original suit in which case the

decree would have been passed against the father only and the suit would have been dismissed as against the son.

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If the decree was obtained against the father only and the father dies before the decree is executed or fully executed, the decree can of course be executed against the son (under S. 234 of the Civil Procedure Code) in his character as 'legal representative' of the deceased judgment-debtor; and in that case only the separate or self-acquired property of the deceased father can be attached and sold as the property of the deceased which has come to the hands of the legal representative, but according to the course of decisions in this Presidency, the joint family property in the hands of the son could not be attached and sold either in whole or in part the *ratio decidendi* of these decisions being that in executing the decree against the son on the death of the father, the question whether the debt is an illegal or immoral one cannot be raised in execution proceedings and that the decree can be executed against the son under S. 234, Civil Procedure Code, only as the legal representative of his deceased father, who, equally with the father, will be bound by the decree whatever may have been the character of the debt but who will be liable to satisfy the decree only to the extent of the 'assets' of the deceased father, *i. e.*, his separate or self-acquired property, which have come to his hands.

In my opinion the result will be the same if pending a suit brought against the father only, the father dies before decree and the plaintiff instead of bringing a fresh suit against the son as such prosecutes the suit against him as the legal representative of his deceased father and obtains a decree against him in that character.

It has also been established by judicial decisions that notwithstanding that a decree has been obtained against the father, the creditor may after the father's death sue the son, subject of course to the law of limitation, upon the original cause of action—which so far as the father was concerned has merged in the decree against him—and obtain a decree against the son for the debt due by the father or for so much thereof as has not been paid or recovered in execution of the former decree against the father himself or (after his death) against the son in his character as legal representative



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and that the period of limitation in respect of such a suit against the son begins to run not from the date of the death of the father but from the date from which limitation commenced to run against the father himself, *Mallesam Naidu v. Jugala Panda*<sup>1</sup>. In such a suit against the son, he can of course plead the illegal or immoral character of the father's debt, but if he fails to establish that defence and a decree is obtained against him it cannot be executed against him personally but only by attachment and sale of the whole or any portion of the joint family property in his hands.

The difficulty arises in cases in which such an action against the son, upon the original cause of action is barred at the time of the death of the father, though the execution of the decree obtained against the father is not barred. This difficulty was sought to be overcome in the case reported in *Mallesam Naidu v. Jugala Panda*<sup>1</sup> by attempting to treat the suit against the son as a suit upon the judgment which had been obtained against the father—in which case the period of limitation would, under Art. 122, be 12 years from the date of the judgment. In that case the Division Bench which referred it for the opinion of a Full Bench on another point overruled this contention on the ground that the sons not being parties to the judgment it was not binding upon them and they could not therefore be sued upon a judgment obtained against the father. As against the *judgment-debtor* himself or against his *legal representative* (who as such is equally bound by the judgment) it has long been held that under the Indian processual law the remedy is only by way of execution of the decree and that no suit could be brought upon the judgment (*Merwanji Nowroji v. Ashabai*<sup>2</sup> and S. 94 of the Presidency Small Cause Courts Act XV of 1882) expressly provides that no suit shall lie on any decree of the Small Cause Court, and this provision is directly applicable to the present case in which the judgment against the father was passed by the Presidency Court of Small Causes at Madras.

The principal question which has been referred to the Full Bench in this case is whether a decree for money against the father by its own force creates a debt binding on the father, which his sons are under an obligation to discharge, unless they show that

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1. I. L. R. 23 M. 292.

2. I. L. R. 8 B. 1.

such debt was illegal or immoral. This question does not appear to have been ever before directly raised or considered, though the numerous cases in which a sale of joint family property in execution of a decree for money against the father has been held to bind the son's share and interest therein really proceed on the footing that the decree-debt as a debt of record is binding upon the son and that therefore the sale is binding upon him and the onus has not been cast on the purchaser at such sale to prove and establish as against the son, independently of the judgment, the original antecedent debt or obligation in justification of the sale, as he would have had to do if there had been no judgment against the father but the father had made a voluntary sale of joint family property for the discharge of an alleged antecedent debt. In my opinion the first question referred to the Full Bench must be answered in the affirmative for the following reasons. As the decree-debt cannot be recovered from the son (after the death of the father) by executing the decree against him personally or in respect of joint family property in his hands and as it is always open to him to contend that the decree debt is illegal or immoral and therefore it does not bind him, the reason why no suit could be brought against the father himself for recovery of the judgment-debt is inapplicable to a suit being brought against the son for recovery of the decree-debt. No doubt, as held in the order of reference in the case in *Mallesam Naidu v Jugala Panda*<sup>1</sup> already referred to, a suit would not lie against the son on a judgment obtained against the father to which the son was no party and which, therefore, as a judgment could not bind him. But I can see no reason why a suit could not be brought against the son to recover a debt of record due by the father, which debt the father was under an obligation to discharge, quite independently of the cause of action or the alleged original debt on which the suit had been brought against him. Under the English law a judgment that the plaintiff shall recover, against the defendant, a sum of money as debt or damage or costs of suit, creates a debt which is therefore a debt or contract of record and a judgment for the defendant that he shall recover a sum of money for his costs of defence also creates a debt of record. Judgments of courts not of record and judgments of foreign and colonial Courts create simple contract debts. (Leake on Contracts,

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p. 133). Payment of these debts can be enforced not only by 'execution of the ordinary process of the Court,' but also by an action of debt upon the judgment except in respect of judgments of the Statutory County Courts in regard to which it has been held—as it has been held in India with reference to the judgments of all courts governed by the Code of Civil Procedure—that an action upon the judgment would be inconsistent with the remedies on the judgment provided by the County Courts Acts. There is no reason whatever for holding that, under the Hindu Law, judgments given by the Sovereign or by judicial tribunals established by him are less solemn or less obligatory by their own force than they are under the English Jurisprudence. A Hindu father therefore against whom a decree has been passed for a sum of money is under no less obligation—legal and religious—to obey the decree and discharge the debt thereby imposed upon him than to discharge debts 'contracted' by him; and the pious obligation of the son to discharge his father's debts extends as much to the one as to the other. The whole of the joint family property in the hands of the son must be held liable to satisfy the debt imposed upon the father by the judgment, as a solemn debt of record, quite independently of the original cause of action or alleged debt on which the suit against the father had been brought. In cases in which a cause of action against the father, for a tort, may not survive him or though surviving him the tort committed by the father may be one in respect of which the son as such may not under the Hindu Law be under a pious obligation to make good the damages out of joint family property, no suit could, on the death of the father, be brought against the son; but if a decree for damages had been obtained against the father in respect of such tort the amount awarded as damages would, subject to the exceptions under the Hindu Law, be binding upon the son as a debt of record due by the father and on his death a suit could be brought against the son to enforce payment of the same out of joint family property in his hands though no suit could be brought against him on the original cause of action against the father. The decree against the father can of course, like any other decree against him, be executed against the son, in his character as legal representative to the extent of the separate or self-acquired property of the father which has come to his hands.

In cases, therefore, where a decree for money has been obtained against the father, but he dies before execution of the same, the creditor has, besides executing the same against the son as legal representative, the option of suing the son either on the original cause of action—if it be one in respect of which the son as such would be liable—or to enforce payment of the decree-amount as a debt of record due by the father. In the former case the judgment against the father cannot be relied upon by the creditor as binding the son and he must prove and establish the cause of action or the alleged debt just as if no such suit had been brought against the father and judgment obtained. In the latter case, the judgment as such would not bind the son and it will be admissible only to prove the existence of a judgment-debt due by the father at the date of the judgment ; and the only defences open to the son will be either that the decree-debt is not one which is binding upon him—as being illegal or immoral under the Hindu Law—or that the same has been discharged, whether such discharge (by payment or adjustment) has been recorded as certified (*vide* sec. 258, Civil Procedure Code) or not.

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I need hardly add that it will not be open to the creditor, after the death of the father against whom he had obtained a judgment which has not been satisfied, to recover the amount twice over from the son both by suing him on the original cause of action and also on the judgment-debt, any more than he could at present recover the amount twice over by suing the son on the original cause of action and also by enforcing payment of the judgment-debt by executing the decree (obtained against the father) against the son in his character as legal representative. The same is the case under general law in respect of all joint and several liabilities in regard to which though judgment against one—which remains unsatisfied—is no bar to the recovery of judgment against any other or others of the debtors—there being a cause of action against each severally—yet the amount can be realized only once and the satisfaction in whole or in part of the decree against any one will in law operate as a satisfaction in whole or in part of the cause of action against each of the other debtors and if any decree had been obtained against any of them, as a satisfaction, in whole or in part, of such

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judgment-debt also. (*Dhunput Sing v. Sham Soonder Mitter*<sup>1</sup>,  
Leake on Contracts, 3rd Edition pp. 377 and 780.)

Where the creditor sues the son on the original cause of action, the law of limitation—including the article in the 2nd schedule to the Limitation Act—applicable to such suit will be just the same as that which would be applicable to it if it had been brought against the father himself. This is conclusively established by the principle of the decision of the Court of Appeal in *Beck v. Pierce*<sup>2</sup>. It was there held that the cause of action in respect of which a husband is liable for his wife's ante-nuptial debts is his wife's contract, not his own, and the statute of limitations had always been regarded as beginning to run in his favour as well as in his wife's from the time when the cause of action accrued against her and any acknowledgment or part-payment by her before marriage kept her debt alive both against her and her after-taken husband. In the case of a contract, no doubt, the only person who can under the general law be ordinarily sued on it is the contracting party or his legal representative or in some cases his assign. But if a son is under the Hindu Law under an obligation to fulfil the father's contract of debt, as a husband is under the English Law to fulfil his wife's ante-nuptial contract of debt, the suit against the son or the husband is a suit on the contract just as much as a suit against the legal representative of a contracting party. It may be that the liability of the contracting party himself is unlimited but that of the son or the husband or the legal representative on the same contract is limited, in the case of the son to the extent of the joint family property in his hands, in the case of the husband to the extent of his wife's property which he may have acquired, and in the case of the legal representative to the extent of the assets of the deceased which may have come to his hands. But in all these cases the cause of action on which the son, husband or legal representative is liable to be sued is that against the father, wife or person represented respectively, and the law of limitation applicable is therefore the same.

In *Narasinga v. Subba*<sup>3</sup>, however, it was held by this Court that a suit on a bond against the executant thereof and his sons was

1. I. L. R., 5 C. 291.    2. L. R. 23 Q. B. D. 316.    3. I. L. R., 12 M. 139.

not, with reference to the provisions of Act XI of 1865, a suit of a nature cognizable by a Court of Small Causes, so far as it sought relief against the son. No reasons are stated in the judgment, but if, as contended by the respondents' pleader, the inference to be drawn from the judgment is that the suit, as against the sons cannot be regarded as founded upon a 'contract' within the meaning of S. 6 of Act XI of 1865, I am, with all respect, unable to concur in that decision.

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The decision in *Beck v. Pierce* (already referred to) is also decisive on the question that the recovery of a judgment against the father—which has however not been satisfied—is no bar to a subsequent suit against the son on the same cause of action.

Where the creditor however sues the son, not upon the original cause of action, but to recover the debt created by the decree (against the father) as a debt of record, the article of the Limitation Act applicable to the suit would be the residuary article No. 120 which prescribes a period of 6 years commencing from the time when the cause of action accrued. The cause of action for such a suit being the contract of record which imposed the decree debt upon the father, time will begin to run from the date of the judgment against the father unless the decree itself provided for payment of the decree-debt at a future date, in which case time will run from such date. It should however be borne in mind that the son is not legally bound to discharge the father's debt if it was not a subsisting debt at the date of the father's death. If therefore the execution of the decree against the father was barred at the date of his death, the creditor cannot bring a suit against the son to enforce payment of the debt of record though the period of 6 years from the date of the judgment has not expired.

The answer to the second question therefore is that if the suit against the son is upon the original cause of action, the law of limitation applicable thereto is the same as that which would have applied to the suit if it had been brought against the father, himself; but if the suit is for the recovery of the debt of record arising from the decree against the father, the article of the law of limitation applicable to it is No. 120 of the 2nd schedule to Act XV of 1877.

As regards the third question referred to the Full Bench, it is admitted by both sides that in the view which we have expressed

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Chettiar.

on the first and the second questions this question becomes unnecessary and as the point is one of considerable difficulty involving a consideration of several English and Indian decisions cited before us, I prefer to express no opinion on it in a case in which the question does not really arise beyond observing that, for purposes of giving a fresh starting point for computing the period of limitation, payment of interest or part payment of principal by a Receiver or guardian may stand on a different footing from an acknowledgment of liability made by him.

RUSSELL, J. :—I concur. \_\_\_\_\_

### IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Rajah of Venkatagiri ... Appellant\* in all (*Plaintiff*).  
v.

Musani Chench Reddi ... Respondent in S. A. No 92 of  
1902 (*Defendant*).

Rajah of  
Venkatagiri  
v.  
Musani Chench  
Reddi.

*Landlord and tenant—Tenant's holding—Relinquishment of portion—Validity.*

Where a tenant relinquishes portions of the dry lands in his holding, such relinquishment is invalid if the portions are not ear-marked and not capable of identification and the tenant pays a consolidated assessment on his holding.

If the portion is a separate holding bearing a separate assessment, then the relinquishment will be valid.

Where a tenant holds dry and garden lands, it is open to him to relinquish the dry lands keeping the garden lands when the latter bear a separate assessment.

Suit by the Raja of Venkatagiri against 3 ryots under Act VIII of 1865 for execution of a Muchilika.

The defendant's contention was that the patta tender was not proper as it contained also a portion of land relinquished by the defendant in writing. The Sub-Collector held that the land held by the defendant was "varvadai" and that they could not therefore make a partial relinquishment. Upon appeal to the District Court the District Judge held that there was no rule that a partial relinquishment of varvadai lands could not be made and directed the patta to be amended by omitting the lands so relinquished. Hence this second appeal.

[Varvadai lands are dry lands in which a portion pays a higher assessment than the rest. Originally the ryots of these holdings were entitled to certain privileges].

\* S. A. Nos. 92 to 94 of 1902.

18th August 1903.

Second appeals from the decrees of the District Court of Vellore in A. S. Nos. 134, 135 and 136 of 1900, presented against the decision of the Court of the Sub-Collector at Nellore in S. S. Nos. 62, 63 and 55 of 1900 respectively.

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Venkatagiri  
v.  
Musani Chen-  
chi Reddy.

*S. Subrahmania Aiyar* for appellant.

The Court delivered the following

**JUDGMENTS :—***In S. A. Nos. 92 and 93 of 1902.*—In those two cases, we must hold that the plaintiff was entitled to refuse to accept the relinquishments proposed to be made by the tenants inasmuch as these relinquishments were of portions of the entire dry lands comprised in the holdings which portions, are not earmarked and not capable of identification. It appears that what is virtually a consolidated assessment is imposed on the whole of the dry land in each holding although in arriving at the total sum the rent on a portion of the area is calculated at a higher rate than on the rest of the dry land. Under such a system, it is clear that a tenant cannot relinquish a portion of his dry holding as if that portion was a separate field bearing a separate assessment. We accordingly allow these two second appeals with costs in this court and in the Lower Appellate court, set aside the decrees of the District Judge, and restore the judgments of the Sub-Collector.

*In S. A. No. 94 of 1902.*—Here the holding of the tenant includes dry lands and garden lands and the tenant has relinquished the whole of the dry lands retaining the garden lands which bear a separate assessment. We agree with the District Judge that this relinquishment should be accepted and we accordingly dismiss this second appeal.

#### IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar and Mr. Justice Davies.

Lakshmi Ammal ... Appellant\* (1st Deft. Judgment-debtor).  
v.

Subramania Pillai ... Respondent (Plaintiff Decree-holder).

*Execution, order in, res judicata—Transfer of Property Act S. 90.*

Where an order was passed allowing execution to issue against properties other than that mortgaged and comprised in the decree a subsequent objection that no sale of such properties could be held in the absence of a decree under S. 90 of the Transfer of Property Act could not be allowed to prevail.

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Ammal  
v.  
Subramania  
Pillai.



Lakshmi  
Ammal  
v.  
Subramania  
Pillai.

Appeal from the order of the District Court of Tinnevely, dated 12th November 1901, in Appeal against order No. 18 of 1901 presented against the order of the Court of the District Munsif of Ambasamudraim, dated 17th August 1901 passed on M. P. No. 915 of 1901 in O. S. No. 107 of 1893.

This was a petition by the plaintiff (decree-holder—in O. S. No. 107 of 1893) to confirm the sale of the properties belonging to 1st defendant held in execution of the above decree and purchased by the plaintiff himself on 11th January 1901. He also stated that he filed a petition on 5th March but as notice was not served he was directed to put in a fresh petition.

This petition was filed on 26th June 1901. The judgment-debtor (1st defendant) opposed this application on 16th August 1901 although he did not put in any application within the time prescribed by law to set aside the sale. The petitioner then stated that he withdrew this petition. The District Munsif thereupon held that the effect of such withdrawal was to cancel the sale and thereupon cancelled the sale. Upon appeal the District Judge reversed this and held that the effect of the withdrawal was not to cancel the sale in the absence of an application to set aside the sale at the instance of the judgment-debtor. He held that the proper procedure was that laid down in 10 M. L. J. R. 205. Hence this second appeal. The appellant's objection was that the decree was a mortgage decree, that the sale was of properties not comprised under the decree and that such sale could not be held in the absence of a decree under S. 90 of Transfer of Property Act.

*M. R. Ramakrishna Aiyar* for appellant.

*V. C. Seshachariar* for respondent.

The Court delivered the following

JUDGMENT:—It appears that an application for a sale of property other than that mortgaged was made in 1898 and execution granted after notice to the appellant. In the face of that order the present objection cannot be taken.

The appeal is dismissed with costs.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir S. Subrahmania Aiyar, *Officiating Chief Justice*,  
and Mr. Justice Bhashyam Aiyangar.

Vidyapurna Thirtha Swami, minor, by  
next friend Vyasacharya ... Appellant \*(*Plaintiff*).  
v.

Vidyanidhi Thirtha Swami (died), a  
lunatic adjudged to be so under  
Act XXXV of 1858, and others .. Respondents (*Defendants*,  
*party respondent in place*  
*of 2nd respondent removed*  
*and legal representative of*  
*the deceased 1st respondent*).

*Religious endowment—Mutt—Headship of Mutt—Corporation sole—Effect of lunacy—*  
*Vacancy—Powers of mathadhipati—Practice—Second Counsel.*

Vidyapurna  
Thirtha  
Swami  
v.

The head of a mutt being a corporation sole does not forfeit his position by his subsequent lunacy. He is not a mere trustee and his subsequent lunacy does not create any vacancy in his office.

Vidyanidhi  
Thirtha  
Swami.

A debt incurred by the head of a mutt, though proper and appropriate with reference to the head who incurred it will not bind the property of the institution in the hands of his successors if the debt is not shown to have been incurred for a purpose necessary for the maintenance of the institution as a mutt. *Sammantha Pasadara v. Sellappa Chetti*<sup>\*</sup> discussed.

Per Subrahmania Iyer, Offg. C. J. :—

The law gives heads of mutts full power of disposition over what remains of the income after defraying the established charges of the institution while in respect of the *corpus* it treats the individuals composing the line of succession as if they were tenants for life.

The consecrated idol in a Hindu temple is a juridical person.

In the case of mutts the ideal person is the office of the spiritual teacher (Acharya) which, as it were, is incarnate in the person of each successive Swami who for the time is a real owner and not a mere trustee.

Per Bhashyam Aiyangar, J. :—

Property of a mutt like the benefice of a bishopric of the Christian church is substantially inalienable.

The head of a mutt has absolute dominion over the revenues accruing during his lifetime subject, however, to the limited burden of maintaining the mutt.

\* A. No. 227 of 1900.

6th January 1904.

J. I. L. R., 2 M. 175.

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Thirtha  
Swami  
v.

Vidyanidhi  
Thirtha  
Swami.

The conception of a "corporation" is not foreign to the Hindu Law and has been worked out not only in respect of religious foundations and eleemosynary institutions but also in respect of lay institutions and offices.

A second counsel can be heard for the same party.

Appeal from the decree of the Subordinate Judge's Court of South Canara in O. S. No. 39 of 1899.

*The Advocates-General (J. E. P. Wallis), C. Sankaran Nair, K. Narayana Rao and T. Narasimhachariar, for appellant.*

*C. Ramachandra Rao Sahib, P. R. Sundara Aiyar, K. P. Madhava Rao, C. Krishnan, H. Narayana Rao, A. Srinivasa Poi, and K. N. Aiya, for respondents.*

Their Lordships delivered the following

**JUDGMENTS :—THE OFFICIATING CHIEF JUSTICE :—**The plaint mentioned mutts, Bhandarkare in South Canara and Bhimasetu in Mysore Territory, are two ancient mutts presided over by Swamis or ascetic heads of the Madhwa persuasion. The case of the plaintiff—a minor—is that the two mutts are dwandva or interdependent mutts, the Swami of each being entitled to appoint to the other, in the event of the Swami of either dying without having appointed and leaving a successor, or a vacancy otherwise occurring; that he was appointed as the head of Bhandarkare Mutt by the present Swami of Bhimasetu Mutt on the death of one Vidyasamudra, who had been ordained and appointed by the 1st defendant the deceased Swami of Bhandarkare Mutt as his junior before he (the 1st defendant) became and was, on inquisition under Act XXXV of 1858, found to be a lunatic.

The argument on the plaintiff's behalf in the appeal was that the 1st defendant as Swami was in the position of a *trustee*, that on his becoming a lunatic he ceased to be the head of the mutt and that Vidyasamudra being dead at the date of the plaintiff's appointment, that appointment by the Bhimasetu Swami constituted the plaintiff the head of Bhandarkare mutt. The contention on the other side was that there was no dwandva right as alleged, that the 1st defendant's position as Swami was void of real analogy to that of a trustee, that his lunacy did not divest him of his right to the headship, that until his death there was no vacancy and that

the plaintiff therefore derived no right to the mutt by virtue of the appointment relied on by him, even granting that the Bhimasetu Swami had the power to fill up a vacancy should any such have occurred.

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The 1st defendant having continued to be a lunatic down to his death pending the suit, the question for determination is, whether the appointment relied on by the plaintiff was made in circumstances which could confer on him the status claimed, assuming that the Bhimasetu Swami had a right to nominate as alleged—in short, whether at the date of the suit or prior to it there was a vacancy in the headship of Bhandarkare mutt.

Now there can be no doubt that institutions of the class under consideration were established as centres of theological learning, and in order to provide a line of competent teachers with reference to the established Hindu creeds of the country. If any proof of this statement were necessary, that is furnished by the unquestionable connection which exists between some of the more important of this class of institutions and the leading exponents of the tenets of those creeds. As pointed out in Mr. Ghose's Hindu law, p. 680, no less than seven mutts, being among the most celebrated, owe their origin to the great Adwaita Philosopher Sankarachariya. Other mutts not less numerous or important following the tenets of the Vishishtadwaita system of Ramanujacharya are traceable to that teacher. The well-known eight mutts at Udipi, the centre of the Dwaita system of thought, are on all hands admitted to have been founded by Madhwacharya, the great expounder of that system. The Sudra mutts, of this Presidency, of which those at Dharmapuram and Tiruvaduthorai are the chief, represent what is known as the Saiva Siddhantam.

The influence exercised by mutts as centres of learning on the religious and other literature of the country cannot be denied. The varied and well-known contributions made thereto by the famous Vidyaranya Swami of the Sringeri or Sarada Mutt, or under his auspices, are among the most conspicuous examples of this kind. There is scarcely a branch of learning considered by Hindus as important, to which Vidyaranya or the scholars whom he gathered round him, did not make valuable contributions, and it is to his

Vidyapurna Thirtha Swami v. Vidyandhi Thirtha Swami. commentaries that the modern world owes its knowledge of the traditional meaning of the oldest of sacred books—the Rig Veda. Nor has the influence of the mutts at Dharmapuram, Tiruvaduthorai, &c., on the Dravidian literature been inconsiderable.

Though in recent times the men who have succeeded to the headship of the mutts have generally been inferior, their predecessors, as a whole, were men of learning and piety, who adequately ministered to the spiritual wants of the community, and even now the heads of some of these mutts enjoy the esteem of the community and continue to serve more or less the purpose intended. Such having been the origin and object of these institutions, which have embraced the whole Hindu population of the country, and numbered, among their adherents and supporters, princes and noblemen, it goes without saying that the establishment of these mutts was followed by their being more or less well endowed.

As to the rights of the Swamis in relation to the mutts and their endowments there was on the one hand the cardinal principle of the law of the land that properties given for the maintenance of charities, religious or otherwise, were ordinarily inalienable, (*West and Buhler, Hindu Law*, pp. 201—202, *Maharanee Shibessoori v. Modoorath<sup>1</sup>*, *Prosunno Kumari v. Golapchund<sup>2</sup>*, *Narayan v. Chintaman<sup>3</sup>*, and *Collector of Thana v. Harisitaran<sup>4</sup>*, and on the other, the fact that the Swamis were not mere employees or subordinates in the institutions, but heads thereof, whose duty it was to promote learning and further the interests of religion; such heads moreover as ascetics not prone to be affected by motives incident to worldly life, requiring less restraint in dealing with property than ordinary men. It followed, therefore, that the law gave them over what remained of the income after defraying the established charges of the institution, a full power of disposition, while in respect of the *corpus* it treated the individuals composing the line of succession as in the position of tenants for life (*Baboo Annada Prasad v. Nil Madheb Bose<sup>5</sup>*; *Khusalchand v. Mahadevgiri<sup>6</sup>*). I think it right to add that I am unable to agree with the conclusion in *Sammantha Pandara v. Sellappa Chetti<sup>7</sup>*, if that is

1. 13 M. I. A. 270.

2. L. R., 2 I. A. 145.

3. I. L. R., 5 B. 393.

4. I. L. R., 6 B. 546.

5. XX W. R. Cri. Rulings, p. 471.

6. 12 B. H. C. R., p. 214.

7. I. L. R., 2 M. 175.

to be understood as implying that, a debt incurred by the head of a mutt, though proper and appropriate with reference to the head who incurred it, would bind the property of the institution in the hands of his successors even though the debt is not shown to have been incurred for a purpose necessary for the maintenance of the institution as a mutt.

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Nevertheless it must be admitted that there is no direct authority pointing out the precise jural character of the heads of institutions of the kind referred to above. In determining what that is, it is but right and necessary to refer to the view taken by the law with reference to another set of institutions which owe their origin to the same causes that operated to bring mutts into existence. Of course, I refer to temples along with mutts, which in order that organized worship of God and spiritual knowledge might go hand in hand, the religious instinct of the people designed as places of public resort for worship, and which were endowed far more richly than mutts. No doubt those that have made and still make such endowments do not look upon what the endowments are dedicated to in the light the law views them. Even with reference to donors in countries where anthropomorphic ideas of God find little place, it has been observed: "His worshippers who gave him lands and goods regarded him, if in one sense as a supernatural person, yet in another and a very real sense, as a natural person; he was no creature of human thought, he lived and could hold property" (Pollock and Maitland's History of the English Law, Vol. I, p. 491). It is not strange, therefore, that in a country like this, where the sacred books of the people abound in personified descriptions of the Deity, His powers and attributes, the belief of donors should be similar and even stronger, as will be seen from *Doorga Prasad v. Shiva Prasad*<sup>1</sup>, where *MacDonnell*, and *Tottenham J.J.* observed: "According to Hindu notions when an idol has once been so to speak consecrated by the appropriate ceremony being performed and mantra pronounced, the deity of which the idol is the visible symbol resides in it." It is to give due effect to such a sentiment, widespread and deep-rooted as it has always been, with reference to something not capable of holding property as a natural person, that the laws of most countries have sanctioned the creation of a fictitious person in the

1. 7 C. L. R., 278.

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matter, as is implied in the felicitous observation made in the work already cited : "Perhaps the oldest of all juristic persons is the God, hero or the saint" (Pollock and Maitland's History of English Law, p. 481).

That the consecrated idol in a Hinda temple is a juridical person has been expressly laid down in *Manohar Ganesh v. Lakshmiram*<sup>1</sup> which Mr. Prannath Saraswati, the author of the Tagore Lectures on endowments rightly enough speaks of as one ranking as the leading case on the subject, and in which *West, J.*, discusses the whole matter with much erudition. And in more than one case, the decision of the Judicial Committee proceeds on precisely the same footing (*Maharanee Shibessouree Debia v. Mothoranath Acharjo*<sup>2</sup> and *Prosunno Kumari Debya and another v. Golab Chand Baboo*<sup>3</sup>). Such ascription of legal personality to an idol must however be incomplete unless it be linked to a natural person with reference to the preservation and management of the property. Hence the treatment of idols as if they were infants perpetually, and providing them with human guardians designated by various names in different parts of the country. In *Prosunno Coomar Debia v. Golapchand*<sup>4</sup> the Judicial Committee observe thus : It is only in an ideal sense that property can be said to belong to an idol and the possession and management must in the nature of things be entrusted with some person as sebaite or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property at least to as great a degree as the manager of an infant heir"—words which seem to be almost an echo of what was said in relation to a church in a judgment of the days of Edward I : "A church is always under age and is to be treated as an infant and it is not according to law that infants should be disinherited by the negligence of their guardians or be barred of an action in case they would complain of things wrongfully done by their guardians while they are under age" (Pollock and Maitland's History, Vol. I, p. 383)—a principle which it were to be wished the law held fast to in the matter of the application thereof to a greater extent than is now the case in connection with the law of limitation for suits.

1. 1. L. R., 12 B. p. 247.

2. 13 M. I. A. 270.

3. L. R., 2 I. A. 145.

4. L. R., 2 I. A. 145.

Such being the position unequivocally taken up by the law with regard to one set of those kindred institutions, it seems but right to adopt a similar theory with reference to the other set of institutions also with only so much modification as certain special features of the latter necessarily call for. In the case of temples the ideal person being the idol itself, the natural custodian of the property, who has no beneficial interest whatsoever in the endowments, but occupies the fiduciary position of a mere manager, (*Juggadamba Dossee v. Puddomoney Dassee*<sup>1</sup>) may not improperly be looked upon as subject strictly to the liabilities of a trustee. In the case of the mutts, however, though there are idols connected therewith, the worship of such is quite a secondary matter, the principal purpose of such an institution being the maintenance in circumstances likely to command due respect and estimation a line of competent religious teachers, who as already shown are given for the welfare of the foundation itself a real and so to speak beneficial interest in the usufruct, the restrictions governing the disposition whereof by them being of the nature of a mere moral obligation. Having regard to these facts it is obvious that the correct view to be taken is that in the case of mutts the ideal person is the office of the spiritual teacher Acharya, which, as it were, is incarnate in the person of each successive Swami who for the time is a real owner and not a mere trustee.

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He is, as he would be described in England, a corporation sole. The circumstance that some controversy hang, round this phrase of the English law need not deter one from applying to cases like the present the concept which underlies it; the objection is but to the name (Wooddeson's Vinerian Lectures on the Laws of England, p. 471), while the concept itself is not peculiar to that system of Law, (Lord Mackenzie's Roman Law, VII Edn., p. 163) and is, as Mr. Salmond rightly observes, (*Jurisprudence*, p. 437 note) perfectly logical and capable of serious and profitable uses, as shewn by the fact that modern legislation has in effect created similar legal persons with reference to certain public offices. The following observation of the learned author just referred to (*Jurisprudence*, p. 349), may be quoted as serving to clear up the source of error and confusion in regard to this particular kind of legal

1. 15 B. L. R. 318 at p. 330.



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personality. "The chief difficulty," he says, "in apprehending the true nature of a corporation sole is that it bears the same name as the natural person who is its sole member for the time being and who represents it and acts for it. Each of them is the sovereign, or the bishop or the solicitor to the treasury. Nevertheless under each of these names two persons live, one is a human being administering for the time being the duties and affairs of the office. He alone is visible to the eyes of laymen. The other is a mythical being whom only lawyers know of and whom only the eye of the law can perceive. He is the true occupant of the office. He never dies or retires; the other, the person of flesh and blood, is merely his agent and representative through whom he performs his functions. The living official comes and goes, but this offspring of the law remains the same person." And it seems to me the concept thus well explained is the one best adapted to carry out the objects and purposes of institutions of the character of these mutts.

This being my view as to the real and precise jural character of the head of a mutt of the kind under consideration, I must hold that the 1st defendant did not forfeit his position as a head of the mutt by the mere fact of his lunacy, in the absence of any satisfactory evidence of custom with reference to this particular mutt—a point on which I am in entire agreement with the Subordinate Judge, considering that what evidence there is on the question points altogether against the existence of any such custom.

It is scarcely necessary to say that under the Hindu Law itself, lunacy does not operate to divest rights already acquired; and the analogy, so far as this question of lunacy is concerned, presented by the cases of a bishop and of a beneficed clergyman in England is distinctly in favour of the conclusion arrived at by me. As in them so here, lunacy could only result in the lunatic's power of action remaining suspended during the continuance of the distemper and the vicarious discharge of his functions being provided for in accordance with the established requirements of the institution (cf. Burn's Ecclesiastical Law, Vol. I), p. 306, Title Co-Adjutor and Pope on Lunacy, 2nd Ed., pp. 370—371—a matter to which, as the evidence shows, due attention appears to have

been paid by the committee appointed to take charge of the estate of the 1st defendant when the inquisition was found.

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It is thus clear that neither on the date of the plaintiff's appointment as alleged by him, nor at the date of his suit, was there a vacancy in the headship of the mutt to be filled up by whomsoever such filling up may have had to be done. The appointment relied on by the plaintiff could not therefore be held to have conferred on him any right to the mutt, assuming the existence of the dwandva right, as to which, however, it is not in the circumstances necessary to give any opinion.

I would therefore dismiss the appeal with costs (one set).

BHASHYAM AIYANGAR, J.—The plaintiff (appellant), a minor, sues for a declaration that he has been duly ordained and appointed swami or head of the Bhandarkare mutt by the swami of the Bhimasetu mutt, for recovery of possession of the mutt with all its properties and endowments, from the 2nd defendant, and for recovery from the 3rd defendant of some of the mutt idols and jewels in his possession. The plaintiff mutt, which is endowed with the landed property standing in the name of the presiding deity and an annual tasdik allowance from Government, is situate about ten miles from Udipi, the centre of Madhwa religion, and is one of a number of ancient mutts in that part of the country; the Bhimasetu (or Bhimanakatte) mutt (about 54 miles from Udipi) situate in the present Mysore Province is another of them. The plaintiff mutt was till lately presided over by the 1st defendant who admittedly had been duly appointed to the office by his predecessor. On the 24th June 1896, the 1st defendant was, on inquisition, found a lunatic by the District Judge of South Canara under Act XXXV of 1858. Some time prior to his lunacy he had selected and ordained his brother's son Vidyasamudra, his disciple and successor; and it is admitted that the said Vidyasamudra, a minor of about 15 or 16 years of age, continued to perform the worship of the deities of the mutt after the lunacy of his preceptor. The disciple, however, died on the 9th October 1898, and the head of the Bhimasetu mutt, claiming that the two are dwandva mutts, purported to ordain and appoint the plaintiff as swami of the plaintiff mutt on the 23rd November 1898. It is not clear from the plaintiff whether the plain-

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tiff's appointment was as successor to the 1st defendant or to the deceased young swami (the disciple of the 1st defendant). The Bhimasetu swami, however, as the plaintiff's 20th witness, declared that he appointed the plaintiff to succeed both, the 1st defendant and his disciple. The position taken by the plaintiff apparently is that the 1st defendant by reason of his lunacy vacated his office, that thereupon he was succeeded by his disciple swami Vidya-samudra, that on the death of the latter without nominating a successor, the office of head of the mutt became vacant and that the Bhimanakatte swami, by reason of the two mutts being dwandva mutts, was entitled to appoint him successor. In this view it is contended that the appointment of the 2nd defendant, under S. 9 of Act XXXV of 1858, as 'manager' of the estate of the 1st defendant will be inoperative so far as the mutt and its properties are concerned—as these properties were held by the 1st defendant merely as trustee—though his appointment under S. 10 of the Act as the 'guardian' of the person of the lunatic will hold good.

On the first of these points, the Subordinate Judge finds that the plaintiff has entirely failed to establish that the head of the mutt forfeits or vacates his office by reason of his becoming a lunatic. He further finds that there exist no dwandva rights between the plaintiff mutt and the Bhimanakatte mutt and that the plaintiff's appointment was therefore invalid even if there was a vacancy of the headship of the plaintiff mutt. On these findings he has dismissed the plaintiff's suit; and the principal contentions raised in appeal are that the office has become vacant by reason of the 1st defendant's lunacy or that at any rate, in accordance with the principles of the law applicable to trustees, the appointment of the plaintiff as a new trustee or head of the mutt in place of the 1st defendant who has become lunatic is legal and valid and that the plaintiff has established the existence of dwandva rights between the plaintiff mutt and the Bhimanakatte mutt.

In the view which I take of the case, it is unnecessary to consider and decide whether the plaintiff mutt and the Bhimanakatte mutt are dwandva mutts. Having regard, however, to the fact that the 1st defendant died since the institution of this suit and thus a vacancy has in any view occurred, I should have preferred to decide

this question also, if our decision thereon could bind all parties concerned. But I refrain from doing so—though the point was argued before us at considerable length—as any decision that we may come to on the point, in the present suit, will not bind the Bhimanakatte mutt, the head of which is no party to this suit, nor the Paryaya swami, for the time being, of the Udipi Srikrishna temple, on whose behalf a right of nomination is set up, though he is no party to the suit and who, in fact, has, on the death of the 1st defendant subsequent to this appeal, ordained and appointed a person as successor who for the purposes of this appeal, has been joined as the (8th respondent and) legal representative of the 1st defendant.

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On the other question argued before us, I am clearly of opinion that the Subordinate Judge has come to a right conclusion in holding that the 1st defendant has not vacated his office by reason of his lunacy. His conclusion is fully supported not only by the evidence of the defendant's witnesses—some of whom are the heads of some of the Udipi mutts—but also by the evidence of several of the plaintiff's witnesses—among whom also there are the heads of some others of the Udipi mutts. An instance is also referred to, by the defendant's 10th witness, of a swami of the Puttige mutt having been a lunatic for a time—during which his disciple performed the puja—and having resumed his office on recovery. In the present case too, the Subordinate Judge finds that the 1st defendant himself was on a former occasion a lunatic for about a year and then recovered for a short time and that even after he had been adjudged a lunatic in 1896, he has had lucid intervals. The evidence in the case as to the effect of lunacy is also in consonance with the principle of the Hindu Law that insanity does not divest a person of rights and estates that have already vested in him. The Subordinate Judge has therefore rightly held that the disciple Vidyasamudra never became the head of the mutt or succeeded the 1st defendant, that in fact he was never installed in the Gadhi on the declaration of 1st defendant's lunacy, and that the mere fact of the disciple worshipping the mutt deities during his guru's insanity does not amount to his installation, as it is shown by the evidence on both sides that any other swami also might on such occasions perform the puja.

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I may add that the attempt made on behalf of the plaintiff to establish that the 1st defendant has also forfeited his office by reason of his immorality has entirely failed as the 1st defendant has not, for any such cause, been outcasted or excommunicated—as was once done in the case of the Puttige swami (*vide* Ap. No. 66 of 1881)—in which case the head of the mutt can be properly deposed from his position.

No usage or custom having been proved regulating the procedure consequent on the lunacy of the head of a mutt, the important question to be decided is ‘What is the effect of it, under the general law as regards his relation to the mutt and its endowment? On behalf of the appellant it is urged by the learned Advocate-General, that the head of a mutt is a trustee or at any rate his position is analogous to that of a trustee, and that on the analogy of the English Law of Trusts—which is compendiously reproduced in Ss. 73 and 74 of the Indian Trusts Act—it should be held that a new head of the mutt may be appointed in his place, by the person, if any, entitled to do so or by the Court, if the former head, by reason of his lunacy, becomes personally incapable to act in the trust.

If the head of the mutt was a trustee and the trusts of the institution were of the class to which the general law of trust relates, this argument will no doubt carry weight; and in a case, like the present, in which the head of the mutt has been on inquisition found a lunatic by the District Court, which is the ‘Principal Civil Court of Original Jurisdiction’ referred to in S. 73 of the Indian Trusts Act—the person, if any, entitled to appoint a new head need not make any special application to such Court for an adjudication that the head of the mutt is, by reason of his lunacy, personally incapable of acting in the Trust, but may without such application appoint a duly qualified person as head of the mutt in the place of the lunatic. The fact that a manager of the lunatic’s estate has, in this case, been appointed under S. 9 of Act XXXV of 1858, will make no difference (*cf.* Lewin on Trusts, 10th Edition, p. 8204; Pope on Lunacy, pp. 280 to 290); for the estate of the lunatic, whether the same be a trust estate or his own, will still continue vested in him and the manager can only manage the estate of the lunatic, but not execute the trust which involves the

exercise of discretion. The appointment of the 2nd defendant, in this case, as guardian of the person and manager of the estate of the 1st defendant (*vide Siturama Charya v. Kesava Charya*)<sup>1</sup>, will be no impediment to the plaintiff's appointment as trustee and head of the plaint mutt, if the nomination of its head in cases of vacancy rested, according to usage and custom, with the head of the Bhimasettu Mutt.

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I am, however, of opinion that the head of a mutt, as such, is not a trustee in the sense in which that term is generally understood in the Law of Trusts, and the decision of the question under consideration cannot therefore properly be governed by the principles regulating the appointment of new trustees or by analogies derived therefrom. I may also add that in the case of hereditary trustees in India and other trustees having a beneficial interest in the trust property, the principles of the English Law of Trust—embodied in the Indian Trusts Act—as to the appointment of new trustees, when a trustee becomes incapable of acting by reason of unsoundness of mind, &c., are inapplicable. So far, at any rate, as mahunts and heads of mutts are concerned, the real analogy is in my opinion to be derived from the law relating to Common Law 'Corporations,' particularly 'Ecclesiastical Corporations Sole', for in many respects there is a striking similarity between these English Ecclesiastical Corporations and the ancient and well-established mutts in India like the plaint mutt. I am unable to accede to the learned Advocate-General's contention that the idea of a corporation is an advanced conception of jurisprudence unknown to the Hindu Law. Without implying that 'Trusts' in the ordinary sense are unknown or foreign to Hindu Law (see the *Tagore Case*)<sup>2</sup>, I should say that the notion of a corporate body as a legal entity is clearly recognized and is decidedly more in conformity with the genius of the Hindu Law than the conception of 'Trusts' (*Webb v. Macpherson*)<sup>3</sup>, recently decided by the Privy Council). In *Manohar Ganesh Tambekar v. Lakhmiram Govindram*<sup>4</sup>, Sir Raymond West, a profound jurist and eminent Hindu lawyer, observed (at pp. 263, 264) "that the Hindu Law, like the Roman Law and those derived

1. I. L. R., 21 M. 402.  
3. I. L. R., 12 B., 247.

2. VIII, C. W. N., p. 41 at p. 47.  
4. L. R. I. A. Supp. Vol. at p. 71.

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from it, recognises not only corporate bodies with rights of property vested in the corporation apart from its individual members, but also the juridical persons or subjects called foundations. A Hindu who wishes to establish a religious or charitable institution may, according to his law, express his purpose and endow it, and the ruler will give effect to the bounty or at least protect it so far as any rate as it is consistent with his own *dharma* or conceptions of morality. A trust is not required for this purpose; the necessity of a trust in such a case is indeed a peculiarity and a modern peculiarity of the English Law. In early times, a gift placed, as it was expressed, 'on the altar of god' sufficed to convey to the church the lands thus dedicated. Under the Roman Law of pre-Christian ages, such dedications were allowed only to specified national deities. After Christianity had become the religion of the Empire, dedications to particular churches or for the foundation of churches and of religious and charitable institutions were much encouraged. The officials of the church were empowered specially to watch over the administration of funds and estates thus dedicated to pious uses, but the immediate beneficiary was conceived as a personified realization of the church, hospital or fund for ransoming prisoners from captivity. Such a practical realism is not confined to the sphere of law; it is made use of even by merchants in their accounts and by furnishing an ideal centre for an institution, to which the necessary human attributes are ascribed (*Dhadphale v. Gurave*)<sup>1</sup>, it makes the application of the ordinary rules of law easy, as in the case of an infant or a lunatic. Property dedicated to a pious purpose is by the Hindu as by the Roman Law placed *extra commercium*, with similar practical savings as to sales of superfluous articles for the payment of debts and plainly necessary purposes. Mr. Macpherson admitted for the defendants in this case that they could not sell the lands bestowed on the idol Sri Ranchhod Raiji. This restriction is like the one by which the Emperor forbade the alienation of dedicated lands under any circumstances. It is consistent with the grants having been made to the juridical person symbolized or personified in the idol at Dakor". Dealing with the same subject, the learned authors of the Digest of Hindu Law (W. & B. H. L., pp. 201—202) remark: "The idol, deity or the religious object is looked on as a kind of

1. I. L. R., 6 B., 122.

human entity and the successive officiators in worship as a corporation with rights of enjoyment, but not generally of partition or alienation, except so far as this may be necessary to prevent greater injury. Such endowments are frequently founded by subscriptions and are augmented by gifts and bequests simply to the institution. No rules have, in a majority of these cases, been formally prescribed. The intention of the founders has to be gathered from the traditional practice and the succession is thus determined by the custom of each particular institution though this may have become embraced in some more extensive custom. And as to the management of an endowment, it is not competent for the holders in one generation to impose rules on those of another. The endowment once made cannot be resumed, but performance of the duties may be enforced". Again (at pp. 185, 186, footnote) "The ideal personality of the idol is recognized in many cases. Under the Roman Law, the *res sacre*, in the higher sense, were dedicated to the public divinities and this dedication required the concurrence of the public authority \* \* \* \* \*. The sense of the dominant interest of the sovereign makes itself manifest, even amongst the pious Hindus, in Narada's rule that 'whoever gives his property away (*i.e.*, makes a religious dedication, as gifts for merely secular purposes were discountenanced) must have a special permission to do so, from the King. 'This is an eternal law' (Narada, Transl., page 115. See also, Vyav. May, ch. IV, sec. VII, para. 23). \* \* \* \* \*. No legal restriction has been placed on the dedication of property to either public or private religious purposes \* \* \* \* \*. The inalienable character of land consecrated to religious purposes has been generally recognized, under the Roman, Christian and Muhammadan systems as well as by the Hindu Law and under all has sometimes been found as an embarrassment".

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In *Maharanee Shibessouri Debia v. Modooranath*', in which it was held that lands dedicated to the services of an idol cannot be alienated by a shebait, though he can create derivative tenures and estates conformable to usage (*cf.* Proviso 2 to sec. 11 of the Madras Rent Recovery Act, VIII of 1865), their Lordships of the Privy Council virtually base their decision on the theory of the idol being a juristic person and they observe (at p. 273) 'that the



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rents constituted therefore, in legal contemplation, its property. The shebait had not the legal property, but only the title of manager of a religious endowment.' Again in *Prosunno Kumari v. Golabchand*<sup>1</sup>, in which it was held that shebaits who succeed one another form a continuing representation of the *debutter* property, that though such property is generally inalienable, yet it is competent for the shebait to incur debts for the proper expenses of keeping up the religious worship, repairing the temple, &c., and that Judgments obtained against a shebait in respect of such debts are binding upon succeeding shebaits, though the decrees could be executed only against the (current) rents and profits of the *debutter* property, Sir Montague Smith, in delivering the Judgment of the Judicial Committee, referred to the idol as the owner of the property in an 'ideal sense', though in the nature of things, its possession and management must be entrusted to some person as shebait or manager. In *Jugadamba Dosse v. Poddomone Dosse*<sup>2</sup> the High Court of Calcutta observed (at page 330) "the ownership of the *debutter* property is vested in the idols, the shebaits being, strictly speaking, not trustees for the idol, but managers". In *Narayan v. Chintaman*<sup>3</sup> and the *Collector of Thana v. Hari Silaram*<sup>4</sup> it was held on the authority of the decision of the Privy Council in *Prosunno Kumari v. Golabchand*<sup>5</sup> above referred to, that religious endowments in this country whether Hindu or Mohamedan are not alienable, though the *annual* revenues of such endowments, as distinguished from the *corpus*, may be pledged for purposes essential to the institution endowed.

The religious foundations known as *debutter*, devasthanams or temples are the most numerous in India and have the largest endowments, especially in the shape of lands, assignment of public revenue and jewellery. These institutions have been established for the spiritual benefit of the Hindu community in general or for that of particular sects or sections thereof. The management of these institutions is vested in one or more persons variously known in this Presidency as dharmakartas, panchayets, uralans, &c., but referred to in the Religious Endowments Act (XX of 1863) and in

1. L. R. 2 I. A. 145.

3. I. L. R., 5 B. 393.

2. 15 B. L. R. 318.

4. I. L. R., 6 B., 546, at p. 552.

5. L. R. 21, A. 145.

judicial decisions as trustees, managers or superintendents. Their office is either hereditary or for life and as a general rule they have no beneficial interest in the endowments or their income. As already stated, the worshippers are beneficiaries only in a spiritual sense and the endowments themselves are primarily intended for spiritual purposes, though indirectly and incidentally a good number of people derive material or pecuniary benefit therefrom as office-holders, servants or objects of charity. In the decisions above referred to at length, the presiding idol is treated as a juristic person in whom the properties constituting the endowments are vested. The question has not been suggested or considered, whether the community itself for whose spiritual benefit the institution was founded and endowed may not more appropriately be regarded as a corporate body forming the juristic person in whom the properties of the institution are vested and who *act* through one or more of the natural persons forming the corporate body,—these latter being the dharmakartas or panchayets, &c., charged with the execution of the trusts of the institution and possessing strictly limited powers of alienation of the endowments, as defined in the cases cited above. Though a fluctuating and uncertain body of men cannot claim a profit *a prendre in alieno solo*, nor be the grantee of any kind of real property (see *Goodman v. Mayor of Saltash*)<sup>1</sup>, yet there is high authority for treating such a community as a corporation of juristic persons in relation to religious foundations and endowments. Dealing with the history of Church Endowments, Savigny says :—('Jural Relations' translated by Rattigan, pp. 196—198). "Since then, under the Government of Christian princes, Church Institutions appeared as juristical persons, what is the precise point to which we have here to ascribe the personality, or how are we to form an accurate conception of the subject-matter of the Rights of Property existing in them? Above all, the following contrast to the earlier period is here unmistakable. The ancient gods were conceived as individual 'Persons' resembling individual visible men that one sees around one, and nothing was more natural than that each of them should have his own personal property, while it was only a further development of the same thought when the God who was venerated in a particular temple was represented as a Juristical Person and indeed even granted personal privileges. The

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1. L. R., 7 A. C. 633, at p. 648.

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Christian Church on the other hand rests on the belief in One God and it is united together by this common belief and by the distinct revelation of that one God to one Church. It was an easy matter therefore to import the same principle of unity also into Property-relations, and this conception in fact finds expression in wholly different periods of time, as well in the teachings of writers as in the sentiments and mode of expression of the individual Founders of Endowments. Thus it happened quite commonly that at times Jesus Christ, at other times the Universal Christian Church, or her visible head, the Pope, was designated as the Proprietor of the Church Estate. But a closer consideration must lead to the conviction that this conception is wholly inapplicable to the necessarily restricted province of law and that the recognition of individual juristical persons even with reference to Church Property must be substituted for it \* \* \* \* \*. The subject of the succession (where a testator leaves property to a church) is therefore a particular Church Community, that is to say, the corporation of Christians appertaining to that church \* \* \* \* \*. These writers uniformly recognize the particular Church Community as the possessor of the church property, for instance, therefore, in regard to Parochial Estates, the 'Totality of the Parishioners.' (See also Pollock and Maitland, History of the English Law, Vol. I, p. 4804). For all practical purposes, however, it is immaterial whether the presiding idol or the community of worshippers is regarded as the corporation or juristic person in whom the properties are vested, though from juristic point of view there may be a difference of opinion as to which theory is the more scientific. In the words of a recent writer on Jurisprudence (Salmond's Jurisprudence (1902), p. 346) "the choice of the *corpus* into which the law shall breathe the breath of a fictitious personality is a matter of form rather than of substance, of lucid and compendious expression rather than of legal principle," though, as pointed out by the same writer, the tendency of English law is to prefer the process of 'incorporation' (of human beings) to that of 'personification' (of objects, *e. g.*, a charity, or of institutions, *e. g.*, a church, &c.).

Next to these temples and devastanams, the most important religious foundations in this country are the ancient mutts presided over almost invariably by learned and pious *ascetics*. The origin and growth of these mutts is described in the Judgments of this

Court in *Sammantha Pandara v. Sellappa Setti*<sup>1</sup> and *Giyana Sambandha Pandara Sannadhi v. Kandasami Tambiran*<sup>2</sup> and in the recent work of Mr. Ghose on Hindu Law (Ch. VIII). As stated already, there is a considerable similarity between these mutts and ecclesiastical corporations in Europe, in respect of their origin, growth, and object. Speaking of the early history of bishops in Europe, Cripps, in his 'Law of the Church and Clergy' (3rd Edition, at page 74) observes: "For many centuries after the Christian era the bishop was the universal incumbent of his diocese and received all the profits, which were then but offerings of devotion, out of which he paid the salaries of such as officiated under him as deacons and curates in places appointed. Afterwards when churches became founded and endowed he sent out his clergy to reside and to officiate in those churches, reserving to himself a certain number in his cathedral to counsel and assist him." The origin and growth of mutts in this country is thus described in the two Judgments of this Court already referred to: "A preceptor of religious doctrine gathers around him a number of disciples whom he initiates into the particular mysteries of the order and instructs in its religious tenets. Such of these disciples as intend to become religious teachers renounce their connection with the family and all claims to the family wealth and as it were, affiliate themselves to the spiritual teacher whose school they have entered. Pious persons endow the school with property which is vested in the preceptor for the time being and a home for the school is erected and mattam constituted, *Sammantha Pandara v. Sellappa Chetti*<sup>1</sup>. The ascetics who presided over them were held owing to their position as religious preceptors, and often also in consequence of their own learning and piety, in great reverence by Hindu princes and noblemen who from time to time made large presents to them and endowed the mutts under their control with grants of land. Thus a class of endowed mutts came into existence, in the nature of monastic institutions presided over by ascetics or sannyasis who had renounced the world." The object of these mutts is generally the promotion of religious knowledge, the imparting of spiritual instruction to the disciples and followers of the mutt and "the maintenance and strengthening of the doctrines and tenets of particular schools of philosophy. These

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1. I. L. R., 2 M. 175.

2. I. L. R., 10 M. 375.

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institutions have thus exercised considerable influence over the laymen in their neighbourhood, becoming centres of classical and religious learning." The two classes of institutions, viz., temples and mutts, are thus supplementary in the Hindu Ecclesiastical system, both conducing to spiritual welfare, the one by affording opportunities for prayer and worship, the other by facilitating spiritual instruction and the acquisition of religious knowledge—the presiding element being the deity or idol in the one, the learned and pious ascetic in the other. The position of the head of the mutt is thus not the same as or analogous to that of managers or dharmakartas of devastanams and temples, but resembles more that of Bishops and Archbishops in the Christian System of Europe. In the case of temples, the endowments whether in the shape of landed property or tasdik allowances have to be devoted to the carrying out of the specific purposes connected with the temple, i. e., the daily worship and the periodical ceremonies and festival—purposes defined and settled by usage and custom and generally recorded in what is known as the 'dittam'—and the dharmakartas are mere trustees for the carrying out or executing of such trusts. In the case of mutts, however, such defined and specific purposes immediately connected with the maintenance of the mutt as an institution, are, in the nature of things, very limited and a large part of the income derived from the endowments of the mutt as well as from the money-offerings of its disciples and followers—which offerings as a rule are very considerable—is at the disposal of the head of the mutt for the time being, which he is expected to spend, at his will and pleasure, on objects of religious charity and in the encouragement and promotion of religious learning. His obligation to devote the surplus income to such religious and charitable objects is one in the nature only of an imperfect or moral obligation resting in his conscience and regulated only by the force of public opinion and he is in no way, whether as a trustee or otherwise, accountable for it in law. A corporation, however, like any natural person can act as a trustee (Lewin on Trusts, 10th Edition, p. 30; Kent's Commentaries, Vol. 2, p. 280), and it is not uncommon that a mahant or head of a mutt, as a corporation sole, is appointed as a trustee, manager or superintendent of important temples, devastanams and katalais and in that capacity, he is accountable and responsible,

like any other trustee, manager or superintendent of such religious institutions. In legal contemplation, therefore, the head of a mutt, as such, has an estate for life in its permanent endowments and an absolute property in the income derived from the offerings of his followers, subject only to the burden of maintaining the institution.

Over the *corpus* of the endowment, however, his power of disposition is very limited as in the case of managers of temples and *devasthanams*. He cannot alienate or charge the *corpus* or the income beyond his own life-time, so as to bind the mutt and his successors, except for purposes plainly necessary for the maintenance of the mutt. It should however be borne in mind that such necessity can arise but rarely in the case of mutts and at any rate not to the extent to which it may, in the case of temples. And except under such circumstance, an alienation of the *corpus* or a charge thereon made by him and debts incurred by him will not bind the mutt or his successors, merely because the same was made or incurred for general religious and charitable purposes appropriate to an ascetic or the head of a mutt. If the decision of this Court in *Sammantha Pandara v. Sellappa Chetti*<sup>1</sup> is to be taken as a ruling that a debt incurred by the head of a mutt is binding upon his successor, because it was incurred for such purposes though it was not plainly necessary for the maintenance of the mutt as such, I am with all deference unable to concur in it.

It will thus be seen that the property of the mutt is, like the benefice of a bishopric of the Christian church, substantially inalienable; the head of the mutt for the time being, has, like the bishop (*vide* Stephen's Comm., Vol. 2, p. 765; *Wall v. Nixon*<sup>2</sup>, Encycl. of the Laws of Eng., Vol. IV, tit. 'Ecclesiastical Corporations'): subject however to the limited burden of maintaining the mutt, absolute dominion over the revenues accruing during his life-time. Thus in *Knight v. Mosely*<sup>3</sup>, Hardwicke speaking of the estate of a parson—which is even more analogous to that of the head of a mutt in India—said that he 'has a fee simple qualified and under restrictions in right of the church, but he cannot do everything that a private owner of an inheritance can.' To the same effect, but speaking more generally of all ecclesiastical corporations sole, *Jessel M. R.* in *Mulliner v. Midland Railway Company*<sup>4</sup>

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1. I. L. R., 2 M., 175.

2. 8. R. R. 725.

3. Ambler 175, L. C.

4. L. R., 11 Ch. D. at pp. 622, 623.

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said: "As regards ecclesiastical corporations sole, it was long since decided as to rectors, vicars and others that though in a certain sense owners in fee simple, yet in many respects they had only the powers of tenants for life. Of course no owner in the fee simple can actually enjoy beyond his life and therefore to that extent, they were no better and no worse off than other owners in fee simple. But it was said that being seized in right of their churches, they had not the ordinary powers of other proprietors in fee simple \* \* \* \* and they were not allowed to use their property in the same way as ordinary owners of land." The Master of the Rolls then points out that 'such restricted ownership and restricted rights' are nothing 'new or remarkable,' and by way of further illustration refers to charity corporations and municipal corporations. The head of the mutt being an ascetic, there are no rights of inheritance between him and his blood-relations and the unexpended portion of the revenues devolves, according to custom, on the succeeding head of the mutt, along with the *corpus* of the mutt property. In this respect the case of the bishop is different, as the properties belonging to him personally—including his savings from the revenues of the benefice—devolve upon his legal representatives or heirs, as the case may be, and not upon his successor in office. As regards succession, it is regulated in the case of mutts by the custom or usage of each particular mutt, but in most cases, especially in Southern India, the successor is ordained and appointed by the head of the mutt during his own life-time and in default of such appointment, the nomination may rest with the head of some kindred institution or the successor may be appointed by election by the disciples and followers of the mutt or in the last instance by the Court as representing the sovereign. But whatever differences of detail there may be between the head of a mutt in India and a bishop or other similar ecclesiastical person in Europe, there is a striking similarity between the two in respect of the corporate character of the office and the beneficial enjoyment of the income by the incumbent and in my opinion therefore the head of a mutt is as much a 'corporation sole', as a bishop admittedly is, each being equally with the other "a body politic having perpetual succession and being constituted in a single person, who in right of some office or function, has a capacity to take, purchase, hold and demise (and in some particular instances, under qualifications and

restrictions, power to alien) lands, tenements and hereditaments, to him and his successors in such office for ever, the succession being perpetual but not always uninterruptedly continuous". (Grant on Corporations, p. 625; see also Kent's Commentaries, Vol. 2, p. 274). As in the case of a bishopric, perpetual succession in a mutt is secured by the provision for nomination of a successor (whether by the head of the mutt or otherwise) and by the restriction against alienation—though owing to delay in the nomination of a successor, in cases in which the deceased head of the mutt, has failed to ordain and nominate a successor, there may occasionally be periods of interregnum or vacancy during which there is none in existence in whom the corporation resides and is visibly represented (see Challis, Real Property, 2nd Edition, p. 91).

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The continuity in the designation of the head of the mutt (though in some cases, with a slight variation to identify the natural person) and the use of a corporate seal are other indicia of the corporate character of the institution (*cf.* a notable instance of an ecclesiastical corporation sole, in S. A. No. 388 of 1902\* quite recently disposed of, being the spiritual office of 'Veda Vrithi' in a village, endowed with a small Inam, the advowson or the right of presentation to the office belonging to the Brahmin community of the village).

Far from being foreign to the Hindu Law, the conception of a 'corporation' was worked out not only in respect of religious foundations and establishments and eleemosynary institutions, but also in respect of lay institutions and offices. The King in India was as much a corporation sole as the King in England, and many subordinate chiefs of principalities and feudatories which were in the nature of a Raj, were also, by custom, prescription and sometimes even by charter, 'corporation sole' in analogy to the King, though the chiefs themselves were not really invested with sovereign authority. Several ancient zemindaris, both here and in the north,—which were in the nature of a Raj or principality—and the ancient 'stanoms' of Malabar, really fall under this category. In two learned articles in the Law Quarterly Review (Vol. XVI, p. 335, and Vol. XVII, p. 131), Professor Maitland has made an attempt to criticise the 'concept' of a 'corporation sole,' and

\* Reported at 14 M. L. J. B., 134.



Vidyapurna especially as regards the Crown, he suggests that the King is properly not a 'corporation sole,' but "the head of a highly complex and highly organised corporation aggregate of many", he and his subjects together forming the corporation. Referring to these articles, Mr. Salmond in his 'Jurisprudence' (Edition of 1902, p. 347 footnote) points out that "corporations sole are not a peculiarity of English Law", that 'the distinction between the two forms of incorporation (*viz.*, aggregate and sole) is well known to foreign jurists' and that the conception of a corporation sole "is perfectly logical and capable of serious and profitable uses". Whichever may be the more correct theory as regards the Crown—and even as to this, the same learned writer explains (p. 363) that under a monarchical system of Government, where "everything which is public in fact is conceived as royal by the law, there is no need or place for incorporate commonwealth, *res publica* or *universitas regni*" and 'the citizens of the State are not fellow-members (with the King) of one body politic and corporate, but fellow-subjects of one sovereign-lord' who is a corporation sole. Whichever may be the more correct theory as regards the Crown, it is undoubted that the holders of several public offices have been constituted corporations sole, by recent statutes and described as such (*vide* Pollock on Contracts, 7th Edition, at p. 116; XVII, Law Quarterly Review (1901), pp. 144 to 146. For an instance, in India, see S. 6 of the Charitable Endowments Act, VI of 1890). In a similar way a corporate character also formerly belonged to several important public offices in India, especially military and police, notably poligars. Except in the case of the 'stanoms' of Malabar,—which still preserve their original corporate character, the stanis still being corporations sole—the corporate character of ancient zemindars and poligars, has, by a long course of judicial decisions, been destroyed and an anomalous law of impartibility and of descent to a single heir based unscientifically on family custom substituted therefor, with the result that an issue is raised in each case as to whether the zemindari or poliem is partible or impartible—an issue altogether alien to and unmeaning in respect of a corporation,—the onus being thrown on the party affirming its impartibility. The incident of inalienability attaching to the corporate character has suffered still more. In the earlier decisions ending with the case of *Chintulapati Chinna Simhadri Raj v. The Zemindar of Vizian-*

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Thirtha  
Swami.  
—  
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*nagaram*<sup>1</sup> the principle that a Zemindar had only an estate for life was generally recognised and acted upon. In the case last mentioned, Holloway, J., said : "The *ratio decidendi* of all the cases down to the two latest (1 Mad. H. C. R., pp. 148 and 455) clearly is that the zemindar has really an estate analogous to an estate tail as it originally stood upon the statute *De Donis*. He is the owner, but can neither encumber nor alienate beyond the period of his own life. If he had sold, the sale would be inoperative beyond his life and would amount merely to an alienation of his life interest. It was most unfortunate that the estate of an ancient zemindar in India should have been likened by that eminent Judge to an estate tail under the English Law, as it stood under the statute *De Donis* instead of to the estate of a natural person constituting with his predecessors and successors, a corporation sole. The result has been that the theory of an estate for life had to be gradually abandoned as the same was not based on any intelligible or sound legal basis. Until the decision of the Privy Council in *Rani Sartaj Kuari's* case<sup>2</sup>, the trend of judicial decisions in India was to apply to alienations made by the holder of an impartible zemindari, the principles of the Mitakshara Law applicable to alienation of ordinary partible property. If the zemindar had no coparceners who if the property were partible would be entitled to a share, it was held that the zemindar could at his will and pleasure alienate the whole or any part of the zemindari, whether by act *inter vivos* or by will notwithstanding that the zemindari was an ancestral one. Where however the zemindar had such coparceners he was regarded as occupying the position of managing member of an undivided Hindu family and his alienations were upheld only if they were within the powers of such managing member. Since the decision of the Privy Council in *Girdhare Lall v. Kantoo Lall*<sup>3</sup> in 1874, even the doctrine of the pious obligation of the son to discharge the debts of his father, if they were not illegal or immoral, has been extended to the holders of impartible zemindaris. The restriction of the alienation of an impartible zemindari having been falsely based on the Mitakshara doctrine

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1. 2 M. H. C. R., 128.

2. I. L. R., 10 A. p. 272.

3. L. R. I. I. A. 321 : S. C. 14 B. L. R. 187.

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Thirtha  
Swami  
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Thirtha  
Swami.  
—  
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applicable to *joint family* property owned by *all* the coparceners the result was that when the question was raised before the Judicial Committee in Sartaj Kuari's case, it was decided that the Mitakshara doctrine was inapplicable, the coparceners not being joint owners with the zemindar and that the zemindar therefore could, as sole owner, alienate zemindari or any portion thereof at his will and pleasure. If the succession of a single heir by a rule of promiginiture or the selection of the most competent among the heirs to succeed to the zemindari or poliem—subject in either case, to confirmation by the ruling power, the property of a corporation not being, in law, an estate of inheritance—and the incident of inalienability had both been based on what I consider was the sound jural basis, *viz.*, that the zemindar or poligar was a civil corporation sole, charged (even now) with *quasi*-public duties (*vide* the Judgment of Judicial Committee in the *Madras Railway Company v. Zemindar of Kavainagar*)<sup>1</sup>, and that each natural person who for the time being was zemindar or poligar, had, as in the case of ecclesiastical corporations, only a life estate in the zemindari with a very restricted power of alienation for necessary purposes, but with absolute beneficial enjoyment of the revenues, subject only to the burden of maintaining or making suitable allowances for the members of the family, the question as to whether poliems and ancient zemindaris were in each case partible or impartible would not have arisen; the anomaly of resting their impartibility on family custom and of applying to zemindars and poligars the law regulating the powers of managing members of undivided Hindu families—powers which supplemented as they have been by the English equitable doctrine laid down in *Hanuman Prasad's* case are ample and elastic enough to bring about in course of time the disintegration of zemindaris and poliems, no less than of ordinary partible estates; and the decision of *Sartaj Kuari's* case which was but the logical outcome of basing the impartibility of those estates on the unsound principle of family custom regulating succession by primogeniture would have been averted. The corporate character of these institutions having however long been destroyed by judicial decisions, and by the fiscal laws relating to the sale of land for arrears of revenue due to Government and in no small degree, by a stereotyped form

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1. 14 B. L. R., 209 at p. 217.

of sannad which was indiscriminately issued under Regulation XXV of 1802 in the case of all estates whether they were ancient zemindaris and poliem or merely mittahs or proprietary estates created under the Regulation—in respect of which latter class alone the form of sannad was appropriate—it is unnecessary to elaborate any further the theory of ‘lay civil corporations’ under the common law of this country and advert at any length to the origin and growth of these as important political and official institutions.

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Thirthe  
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Thirtha  
Swami.

—  
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I confess that the theory of the ecclesiastical and lay institutions above referred to being “corporations sole” may seem an ‘old-fashioned sort of notion’ not likely to commend itself readily to the modern mind imbued with the equitable doctrine of ‘Trusts’ on the one hand and the ideas of ‘municipal corporations’ and ‘joint-stock companies’ on the other, as well as with ideas of unfettered freedom of alienation both *inter vivos* and by will and of acquisition by a trespasser or wrongdoer of ownership and of limited interests in immoveable property under the operation of the law of limitation by the wrongdoer persevering in his wrong for over the statutory period whether he be conscious or unconscious of his wrong. But I sincerely trust that in the interests of the moral well-being to the people of this country and of its ‘peace and good government’ the notion will not die out in the case at any rate of ecclesiastical and eleemosynary institutions as it has died out in the case of lay institutions, and that their corporate character will be preserved and their disintegration arrested by extending to them the beneficent provision of Madras Regulation X of 1831, which saves the landed estate of minors from liability to sale for arrears of revenue due to Government—the Collector of course being at liberty to realize the arrears by assuming management of the estate under Act II of 1864,—by prescribing in lieu of the existing period of 12 years from the date of the alienation or adverse possession (*vide Gnanasambantha v. Velu Pandaram*,<sup>1</sup>) a period of limitation of 60 years for suits to recover possession of immoveable property forming the endowment of a public charitable or religious institution, which has been improperly alienated or held adversely to the institution, and lastly, (though not least) by amending the Religious Endowments Act (XX of 1863) so as to better define the constitution of

1. I. L. R., 23 M. 271 P. C.

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the committees established under it, the powers and duties of committees and trustees and their mutual legal relations and render more effective the control of the judiciary over the administration of religious endowments, without in any degree departing from the fundamental principle of the Act, of severing the connection of the executive authorities with such administration.

Reverting now to the subject of religious or ecclesiastical corporations sole, the question to be next considered is the effect of lunacy on the status and rights of a mahunt or head of a mutt. He no doubt becomes incapable of discharging the spiritual as well as the temporal functions of his office, but his lunacy cannot divest him of the life-estate which he has in the properties of the mutt, nor can it divest him of his status as head of the mutt. The only course for the purpose of securing the due discharge of the spiritual function of the office and the management and preservation of the endowment and its income is to provide suitable agency for the purposes. Whereas in the present case, the head of the mutt has been found a lunatic on inquisition under Act XXXV of 1858, no difficulty will arise. Under section 9 of the Act, the Court appoints a 'manager' of his estate; and the lunatic has a life-estate in the endowments of the mutt—subject to the obligation of maintaining the mutt out of the income—the manager is entitled to take charge of such estate and manage the same on behalf of the lunatic and provide for the conduct of the necessary worship and the religious ceremonies of the mutt, by appointing persons duly qualified for the purpose. The surplus income left after meeting the necessary and customary expenses of the mutt, will accumulate for the benefit of the lunatic and his successors. If the head of the mutt should recover his sanity and such recovery is declared by the Court under section 21 of the Act, he will of course be entitled to resume the rights and duties of the office and discharge his temporal and spiritual functions. This procedure is substantially the same as the one obtaining in Europe both under the Canon Law, and in the Church of England, when a bishop becomes insane. The author of the '*Praelectiones Juris Canonici*' (Vol. II, p. 351) refers to the opinion of some who think that from the point of view of the '*jus naturalis*' a bishop loses his jurisdiction from the very fact that he falls into a state that he can never enjoy it; and combating this view, he observes that this cannot be accepted inasmuch as human

rights once lawfully acquired are retained even though he who holds them cannot exercise them himself, for they can be exercised in his name by delegating them—a principle which is in accordance with the genius of the Hindu Law. Under the Canon Law, when an archdeacon or any other person installed in an ecclesiastical office is attacked by lunacy or a disease by which he is rendered unfit to carry out the duties which appertain to him, his Dignity or Office or Benefice does not fall vacant, nor is he to be deprived of it, but provision is to be made for a co-adjutor to him, a portion suitable for the livelihood of the co-adjutor being deducted from the returns. Moderate clothing and food should be provided for the co-adjutor in such a way that the whole of what is left of the profits (after such provision has been made) should remain to the incapacitated prelate or beneficiary (*vide* Tit 'Juris Canonici Theoria,' Vol. I, p. 84). In Burn's 'Ecclesiastical Law' (Vol. I, p. 306 Tit. 'Co-Adjutor') it is stated: "In cases of any habitual distemper of the mind whereby the incumbent is rendered incapable of the administration of his cure. such as frenzy, lunacy and the like, the laws of the church have provided co-adjutors". The procedure in the English law is even now substantially the same and is regulated by the provisions of 6 & 7 Victoria, ch. 62 (see also Pope on Lunacy, p. 370). Applying the above principles to the present case, we find that after the 1st defendant was adjudged a lunatic and the 2nd defendant was appointed manager of the mutt, the late disciple of the 1st defendant was during his life-time, carrying on the ceremonies of the mutt and the worship of Gopinath the idol installed in the mutt and of Ramadeva, the personal God of the head of the mutt—he being qualified to perform the puja for both the idols. Subsequent to the death of the disciple, the 2nd defendant has made due provision for the worship of Gopinath by employing a duly-qualified Grihastha (not an ascetic) and for the worship of Ramadeva—which can be done by an ascetic alone—by entrusting it to the 3rd defendant, the head of one of the Udipi Mutts; the manager himself attends to the secular and temporal affairs of the mutt. The manager appointed under S. 9 of the Act XXXV of 1858 being really an officer of the Court, it is of course competent to the District Judge to give him such directions as may be necessary from time to time for the due discharge of the spiritual and secular functions appertaining to the office of head of the mutt.

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Vidyanidhi  
Thirtha  
Swami.

—  
Bhashyam  
Aiyangar, J.

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Thirtha  
Swami

The appeal therefore fails and I would dismiss it with one set of costs.

v.  
Vidyanidhi  
Thirtha  
Swami.

—  
Bhashyam  
Aiyangar. J.

BY THE COURT.—At the hearing of the appeal when Mr. Sundram Aiyer, junior vakil for the 2nd respondent, began to argue the case following his senior, Mr. C. Ramachundra Row Sahib, objection was taken on behalf of the appellant to second counsel being heard for the same party. This objection we overruled as it is the well-established practice not only in England including the Judicial Committee of the Privy Council but also in this country, though this right is not frequently exercised in this Court the only limitation being here as in England that a third counsel is not at liberty to address the Court on behalf of the party entitled to the reply. We are aware second counsel have been heard in this Court and some of the cases in which this was done were referred to by the learned pleader for the 2nd respondent.

#### IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present : — Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Pakkiam Pillay ... Appellant\* (2nd Deft.).

v.

Seetharama Vadhyar and others... Respondents (1st Plff., 3rd Plff. and legal representative of the 2nd Plff., 4th Plff., 5th Plff.'s legal representative, Plffs. 6 to 11 and Defts. 1 and 3).

Pakkiam  
Pillay  
v.  
Seetharama  
Vadhyar.

*Spiritual office—Inam—Nature of estate—Effect of inam patta.*

Where land is held by a person as emoluments attached to a spiritual office in a village (the right to appoint to the office being vested in the Brahmin Community of the village) such person is entitled to hold the land so long as he is the holder of the office and any alienation of the land to a stranger will be void as against the rightful holder.

Where an inam title-deed is granted by the Government to the holder for such lands and the title-deed contains a term that the inam is the absolute property of the holder which he may hold or dispose of, as he thinks proper, the stipulation has operation only as between the holder and the Government but does not alter the nature of the estate taken under the original grant.

Second appeal from the decree of the Additional Subordinate Judge's Court of Tinnevely in A. S. No. 272 of 1900 presented against the decree of the Court of the District Munsif of Srivilliputtur in, O. S. No. 45 of 1900.

Pakkiam  
Pillay  
v.  
Seetharama  
Vadhyar.

*A. S. Balasubrahmanya Aiyar* for appellant.

*M. R. Ramakrishna Aiyar* for respondents.

The Court delivered the following

**JUDGMENT** :—The inam appears to have been granted originally for the support of a spiritual office in the village, the right to appoint to the office being vested in the Brahman Community of the village. At the time when the inam title-deed was issued in 1865 the holder of the office was Rama Sastri, in whose name the title-deed was issued. But it is clear from the Inam statement (Exhibit H) of Rama Sastri that he did not claim the inam as his hereditary personal inam, but only as the then incumbent of the office. It is found that the 1st plaintiff is now the *de facto* and *de jure* holder of the office. The inam title-deed, no doubt, in terms declares that the inam is the absolute property of Rama Sastri which he may hold or dispose of, as he thinks proper, but this must be construed as intended to operate only as between Rama Sastri and the Government which could have resumed it under Regulation XXV of 1802.

The inam title-deed, therefore, cannot confer on the 1st defendant any title or right which Rama Sastri had not got under the original grant.

The alienation to the 2nd defendant by the 1st defendant (the son of Rama Sastri) is, therefore, void and the plaintiffs are entitled to a declaration that the 1st plaintiff, as the present holder of the office, is entitled to hold and enjoy the office, with its emoluments—*viz.*, the inam and cash allowances so long as he is the holder of the office.

We vary the decree accordingly, but as the appellant has substantially failed, he must pay the costs of this appeal.



## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Periasami Thalavar ... Appellant\* (*Plaintiff*).

v.

Subramanian Asari ... Respondent (*1st Deflt.*).*Contract—Penalty—High rate of interest.*Periasami  
Thalavar  
v.  
Subramanian  
Asari.

Where under the terms of a bond executed to the stake-holders of a certain chit-fund the obligor bound himself to pay 27 cottas of paddy in certain instalment and that on default to pay 1/16th cotta per cotta per diem for interest from date of default.

*Held* that the stipulation was not unenforceable.

Second appeal from the decree of the Additional Subordinate Judge's Court of Tinnevely in A. S. No. 453 of 1899, presented against the decree of the Court of the District Munsif of Ambasamudram in O. S. No. 212 of 1899.

Plaintiff and 5th defendant were joint stake-holders of a lottery or chit. 1st defendant held a share in the same and obtained his prize of 30 cottas of paddy in the 1st drawing. As security for his paying in the subsequent drawings he executed a mortgage-bond promising to deliver 27 cottas in half-yearly instalments of 3 cottas each. Under the terms of the bond, if there was any default in the date of any single instalment the whole was payable with interest at  $\frac{1}{16}$ th cotta per cotta of the debt per decree from date of default. The plaintiff alleged that the 1st defendant did not pay the 5th instalment and the suit therefore was for the balance of the whole debt, i.e., 18 cottas with interest mentioned under the terms of the bond. The question was whether this stipulation to pay interest was not penal and therefore not enforceable. The Munsif held it was not penal. But the Sub-Judge held it was penal and awarded interest at  $\frac{1}{2}$  cotta per cotta a year. Hence this second appeal.

V. C. Desikachariar for appellant.

B. Panchapagesa Sastri for respondent.

The Court delivered the following

JUDGMENT :—There is no allegation that the defendant did not enter into the transaction with his eyes open, or was deceived

\* S. A. No. 1077 of 1901.

24th November 1902.

as to its terms. The bond was entered into in accordance with the rules of the Chit fund, which are not in any way illegal. There is no ground for not allowing the rule to be given effect to.

Periasami  
Thalavar  
v.  
Subramanian  
Asari.

We set aside the decree of the Lower Appellate Court and restore that of the District Munsif with costs in this and in the Lower Appellate Court.

### IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Chief Justice*,  
and Mr. Justice Bhashyam Aiyangar.

Rangan Pattar ... Appellant\* (Ctr.  
v. ... *Ptr. Decree-holder*).

Lakshmi Neithiar and 3 others ... Respondents (*Petr.*  
*and Judgt.-debtors*).

*Civil Procedure Code, S. 244—Objection that property belongs to Tavazhi—Question in execution.*

Rangan  
Pattar  
v.  
Lakshmi  
Neithiar,

An objection by a defendant that immoveable property attached in execution of a decree is not the private property of the judgment-debtor but that of the tavazhi consisting of the defendant, the judgment-debtor and others is one falling within S. 244, C. P. C., and an appeal will lie from the order of the Court of First Instance.

*Ramaswami Sastrulu v. Kameswaramma*<sup>1</sup> followed.

Appeal from the order of the Subordinate Judge's Court of South Malabar at Palghat, dated 4th March 1902, in A. S. No. 860 of 1901 presented against the order of the Court of the District Munsif of Palghat, dated 11th October 1901, in C. M. P. No. 1755 of 1901.

The appellant obtained a money decree in O. S. No. 328 of 1898 against defendants 1 to 3. He attached the properties in dispute as the private property of the defendants 2 and 3. The 6th defendant in the suit objected on the ground that the properties were not the private properties of defendants 2 and 3, but belonged to a tavazhi consisting of defendants 1 to 9. The District Munsif held that the properties were acquired by defendants 2 and 3

\* A. A. A. O. No. 25 of 1902.

11th December 1902.

1. I. L. R., 23 M. 361.

Rangan  
Pattar  
v.  
Lakshmi  
Neithiar.

and rejected the claim. Upon appeal under S. 244, C. P. C., the Sub-judge held that it was the property of the tavazhi and allowing the 6th defendant's appeal raised the attachment. Hence this second appeal.

1st defendant was the wife of Kombi Achen and her daughter was the 2nd defendant and her son the 3rd defendant. Defendants 4 to 9 were the children of the 2nd defendant. The properties were gifted to the 2nd and 3rd defendants and the question was whether the gift was exclusively for the 2nd and 3rd defendants or for the tavazhi which they represented (3rd defendant being the eldest male and one of the 2 managers). The Sub-judge held on the authority of *Kuntacha Umma v. Kuthi Mammi Haju*<sup>1</sup> that the gift was to the tavazhis.

*T. R. Ramachandru Aiyar* for appellant.

*C. Sankaran Nair* for respondent.

The Court delivered the following

**JUDGMENT.**—As regards the first point relied on by the appellant, *viz.*, that no appeal lay from the order of the District Munsif we are concluded by authority. See the judgment of the Full Bench in *Ramaswami Sastrulu v. Kameswarumma*<sup>2</sup>. The Judgment of the Privy Council in *Chowdry Wahed Ali v. Mussamat Jamee*<sup>3</sup>, a case in which, in the language of that Judgment, the circumstances were peculiar and exceptional, is not in conflict with the decision of the Full Bench of this Court.

As regards the facts, it is not necessary to determine whether the burden of proof was on the execution creditor the 6th defendant. There is a finding of fact by the lower appellate Court that the 6th defendant proved that the property in question formed the tavazhi property of the defendant. There is evidence to support the finding. The appeal is dismissed with costs.

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1. 1. L. R., 16 M. 201.

2. 1. L. R., 23 M. 361

3. 11 B. L. R., 149.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Kalliyanasundaram Pillai, minor, by his natural  
 father and guardian Chidambara Pillai ... Appellant\*  
 (3rd Defendant).

v.

Subba Moopanar *alias* Chinnathambi Moopanar  
 and others ... Respondents  
 (Plaintiffs).

*Hindu Law—Co-widows—Mortgage by senior widow—Necessity—Valid as against junior widow and reversioners—Son of next reversioner made defendant—Costs—Common ground—Locus standi of appellant—Civil Procedure Code, S. 540*

Kalliyanasun-  
 daram Pillai  
 v.  
 Subba  
 Moopanar.

Where in a suit upon a mortgage by one of two widows, the next reversioner and his son are brought in as claiming under a settlement executed by the other widow and a decree is obtained, the son of the next reversioner who is so impleaded as defendant has a *locus standi* to maintain an appeal and to appeal against the whole decree under S. 540, C. P. C.

In the case of mortgage or other alienation made by the senior widow, the onus is upon the alienee to show that the consideration was in fact paid and that the loan was raised or the alienation made for a purpose binding on the junior widow and the reversionary heirs; and the fact that the executant of the deed by her written statement fully supports the plaintiff's case in no way affects the onus.

Costs incurred by a widow in respect of a claim which is not *bonafide* and which the widow does not believe to be *bonafide* are not a legitimate charge on the husband's estate and will not constitute a necessity to justify alienation, but costs incurred by the widow in defending the husband's estate in a suit brought by third parties against her as the heir of her husband will be necessity sufficient to justify an alienation.

A mortgage executed by the senior widow for a necessary purpose without the concurrence of the junior widow will be binding upon the latter and the reversioner. 16 M. 1 distinguished.

Appeal from the decree of the Subordinate Judge's Court at Kumbakonam in O. S. No. 79 of 1899.

*B. Nagappa, C. Sankaran Nair, V. Sankaranarayana Sastri and C. S. Venkatramana Sastri* for appellant.

*V. Krishnasami Aiyar and T. Rangachariar* for respondents.

The Court delivered the following

JUDGMENT:—This a suit on an hypothecation bond (Exhibit A) executed on the 4th November 1886, by Athakutti, the senior widow of the last male owner of the property in favour of Appavu Moopanar; a deceased undivided member of the plaintiff's

\* A. No. 48 of 1901.

21st October 1902.

Kalliyanasundaram Pillai  
v.  
Subba Moopanar.

family. The bond was repayable on the 4th November 1887 with interest at 12 per cent. to that date, and thereafter at 15 per cent. The 1st defendant Sellathachi, is the surviving junior widow of the deceased owner, and defendants 2 and 3 are the reversionary heirs in whose favour the 1st defendant executed an instrument of renunciation (Exhibit 7) in 1898, and who are joined in the suit as being in possession of the property jointly with the 1st defendant. The defendants 2 and 3 pleaded that the mortgage was without any lawful consideration, in that the money was not in fact lent. The Subordinate Judge, however, gave the plaintiffs a decree for the full amount sued for and the 3rd defendant now appeals against the whole decree. A preliminary objection is taken by the respondents that the 3rd defendant has no *locus standi* to appeal as he is the son of the 2nd defendant, who is the immediate reversionary heir. We overrule the objection. Both the 2nd and 3rd defendants were joined as deriving title under a settlement made by the 1st defendant and being in enjoyment of the property jointly. The decree proceeds on a ground common to both the defendants. That being so, it was competent to the 3rd defendant to appeal against the whole decree under S. 540, Civil Procedure Code. The onus of proving that consideration was in fact paid, and that the loan was raised for a purpose binding on the junior widow and the reversionary heirs, clearly lies on the plaintiffs, and the fact that the 1st defendant by her written statement fully supports the plaintiffs in no way affects the onus. We cannot agree with the Subordinate Judge that the plaintiffs have satisfactorily proved either the payment of the whole consideration or that the transaction was one beneficial to the estate and as such binding on the defendants. The consideration for Exhibit A is made up of two sums, viz., Rs. 1,524 and Rs. 975. The former is said to be the principal with interest of the sum secured by Exhibit C, a simple mortgage for Rs. 1,500, dated 15th September 1886, and executed by the senior widow in favour of the said Appavu. Assuming that there was in fact a payment of the whole or any portion of the consideration for Exhibit C, we are clearly of opinion that the amount was not borrowed for a purpose beneficial to the estate or that Appavu made proper enquiries and *bonafide* believed that the money was required for the benefit of the estate. The purpose is stated to meet the expenses of O. S. No. 24 of 1886, which the senior widow, and she alone, brought against one

T. Saminatha Chetty for the redemption of certain lands mortgaged to him for Rs. 10,000 by the widow's deceased husband. The junior widow was impleaded as 2nd defendant, and both she and Saminatha put in written statements giving particulars of the settlement made on the 15th June 1886 between the two widows on the one hand and Saminatha on the other, whereby the equity of redemption was released in favour of Saminatha for substantial consideration. If the specific statements made in the written statements were false, the senior widow would certainly not have withdrawn the suit as she did, but would have prosecuted the claim with success. We find, however, that on the 27th February 1887 she executed a release (Exhibit 15) reciting among other things that her claim was unfounded, and withdrew the suit on payment of Rs. 1,100, of which Rs. 1,000 was in the form of a pro-note. These proceedings therefore clearly show that she did not bring the suit believing that she had a *bonafide* claim, but that she must have been set up to make up a false claim by way of speculation, and even if the whole of the sum of Rs. 1,100 was really paid to her, it would have hardly left any margin beyond defraying the costs of the suit. Appavu also must have been aware of the pleadings in the suit at the time when Exhibits C and A were obtained, and there is no evidence that he made any enquiry of the junior widow, who did not join in the suit, but resisted it, or that he was otherwise led to think that the suit was a *bonafide* one for the protection of the estate. We must, therefore, disallow this item, at any rate, against the reversionary interest of defendants 2 and 3 on the death of the 1st defendant.

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v.  
Subba Moopanar.

As to the other part of the consideration of Exhibit A, *viz.*, Rs. 975, the recital is that it was received for payment of the maintenance due to Sivagami Achi and for discharging debts already incurred in O. S. No. 13 of 1881 and O. S. No. 230 of 1881 which terminated in second appeal in 1886. Sivagami Achi had a decree for the maintenance and there is evidence that the sum of Rs. 200-0-0 was, in fact, paid into Court on this account. We find that this sum was borrowed for a purpose binding on the estate and should be allowed to the plaintiffs with interest as provided in Exhibit A from the date of Exhibit A. It is also proved by Appavu Pillay that he received Rs. 770 on

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Subba Moopanar.

the date on which Exhibit A was executed, in discharge of Exhibit B (1), a pro-note, dated 10th December 1883, executed in his favour by the senior widow. He also proves that out of the sum of Rs. 575 which he lent under Exhibit B (1) Rs. 452 was paid on the same date in discharge of Exhibit B, a pro-note dated 5th November 1882 for Rs. 400, in favour of Saminatha Chetty, and executed by both the widows. The execution of Exhibit B by both the widows is proved by the plaintiff's 3rd witness and he also proves that the two sums, making up Rs. 400, therein recited as lent for the conduct of O. S. Nos. 3 and 230 of 1881, were spent for those suits. The suits were brought by third parties against the widows in respect of their late husband's estate, and were successfully defended. Considering that the amount of Exhibit B was borrowed by both the widows and for the purpose of defending the said suits, we may fairly hold that that amount with interest at 1 per cent. *per mensem* (the rate in Exhibit B) till date of Exhibit A with future interest at the rate therein provided is binding upon the property mortgaged as against the defendants—but we cannot allow the difference between the sum paid for the discharge of Exhibit B (Rs. 452-10-0) and the sum borrowed under Exhibit B (1) (Rs. 575), as Appavu gives no evidence to support the claim for the remaining consideration for Exhibit B (1).

The Subordinate Judge finds that Rs. 500 towards interest due on Exhibit A was paid by both the widows on the 23rd February 1890, which payment is evidenced on Exhibit A. The endorsement purports to be marked in token of signature by both the widows, and attested by four witnesses.

We are unable to accept the finding notwithstanding that three of the attesting witnesses have deposed to the payment of the money. This is the only payment either on account of interest or principal ever made during the interval of more than 12 years between the execution of Exhibit A and the institution of the suit, and the conduct of the 1st defendant when she executed the renunciation deed in 1898 in omitting to include this debt along with the other debts therein specified, is inconsistent with her having adopted and ratified Exhibit A, as she must necessarily have done if she had joined the senior widow in making a part payment towards that debt. If she had really made such payment in 1890, it is extremely unlikely that she would not have included

the debt under Exhibit A in the list of admitted debts scheduled in Exhibit 7. It is clear from Exhibit E (3) that the 1st defendant knew of the existence of a possible claim under Exhibit A and obtained an indemnity from the 3rd defendant's guardian in case the claim should be substantiated. If she had really paid Rs. 50), towards the claim and admitted the debt in writing by signing the endorsement of payment on Exhibit A, she certainly would not have treated the claim as a contingent claim that might possibly be substantiated. She would rather have included it in the list of undisputed debts scheduled in Exhibit VII.

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v.  
Subba Moopanar.

The alleged payment by the 1st defendant on account of Exhibit A not being proved, there is nothing to show that she adopted or ratified Exhibit A, and the mortgage, therefore, cannot be enforced even in respect of her life estate, as it might be, notwithstanding the renunciation, if she had ratified Exhibit A before executing the renunciation.

It was contended on behalf of the appellant, that Exhibit A is totally invalid because the junior widow, who was then estranged from the senior widow, did not join in its execution; and in support of this contention reliance is placed on the decision of the Privy Council in the case in *Sri Gagapati Radhamani v. Maharani Sri Pasupati Alakajeswari*<sup>1</sup>. That case, however, is clearly distinguishable from the present. In that case the senior widow when she executed the mortgage was disputing the status of the junior widow as a widow at all, and was also contending that the junior widow, if a co-widow, was entitled only to maintenance.

It has been held in *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba*<sup>1</sup>, (generally known as the *Tanjore Rani's case*), that the position of a senior widow does, as in the case of other co-parceners, give her a preferable claim to the care and management of the joint property, and to the extent therefore of the two sums already referred to the mortgage under Exhibit A, though executed only by the senior widow, did create a valid charge in favour of the plaintiffs as against the junior widow and the reversionary heirs. The decree of the Subordinate Judge must be modified as above indicated. The appellant and respondents will pay and receive proportionate costs of this appeal and the plaintiffs and defendants will pay and receive proportionate costs of the Court below.

1. I. L. R., 16 M. 1.

2. 3 M. H. C. R., 424.



## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Boddam and Mr. Justice Bhashyam Aiyangar.

Gangathara Aiyar and another ... Appellants\* (*Pliffs.* 1 & 2).

v.

Veta Chetty and others ... Respondents (*Defendants*)\*

Gangathara Aiyar  
v.  
Veta Chetty. *Court Fees Act, S. 7, cl. 8—Attachment not binding—Suit to set aside sale is one to set aside attachment—Practice—Procedure—Objection in appeal by defendant appellant that plaint not properly stamped.*

A suit which is in terms to set aside a sale on the ground that an attachment is not binding is virtually a suit to set aside an attachment and Court-fee should be paid on the amount of the attachment or the value of the land attached whichever is less under S. 7, cl. 8 of the Court-fees Act.

Where a plaint is not properly stamped and a decree is given in plaintiff's favor and objection is taken in appeal, the appellant should be made to pay the proper court-fee before the respondent is called upon to pay the deficient stamp duty payable in the Court of the first instance.

Second appeal from the decree of the Subordinate Judge's Court of Bellary and Salem at Salem in A. S. No. 147 of 1900, presented against the decree of the Court of the District Munsif of Krishnagiri in O. S. No. 13 of 1899.

*P. S. Sivaswami Aiyar* for appellant.

*T. Subrahmanya Aiyar* for respondents.

The Court delivered the following

**JUDGMENT:**—The plaintiffs preferred a claim which was disallowed and the attachment continued. This suit, therefore, is virtually a suit to set aside the attachment, which is within clause 8 of S. 7 of the Court-Fees Act, though in terms it was a suit to set aside the sale on the ground that the attachment was not binding. We, therefore, hold that the plaint and the appeals herein should be stamped under cl. 8 of S. 7 of the Court-Fees Act.

The appellants in this second appeal must pay within three weeks from this date the additional stamp duty on the memorandum of second appeal calculated upon the amount for which the land in suit was attached; this being admittedly lower than the value of the land.

The second appeal being adjourned for payment of the proper fees and coming on for final hearing.

The Court delivered the following

**JUDGMENT:**—The stamp duty on the memorandum of second appeal has now been paid on Rs. 714 being the amount for

the realization of which the property was attached. Before the lower appellate Court could have called upon the respondents in that Court to pay the deficiency of *ad valorem* fee on the said amount on their plaint in the original Court, the defendants, the appellants in that Court, should have been ordered within a time to be fixed to pay the deficient stamp duty on the memorandum of appeal presented by them. The lower appellate Court having failed to do this, we reverse the order of the lower appellate Court and remand the appeal to the lower appellate Court and direct that it be restored to the file of that Court and disposed of according to law with reference to the foregoing observations. The costs of this second appeal will be costs in the cause.

Gangathara  
Aiyar  
v.  
Veta Chetty.

### IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir S. Subrahmania Aiyar, *Officiating Chief Justice*,  
and Mr. Justice Moore.

Venkata Narasimha Appa Row ... Appellants\* (*Defendant*)

v.

Nalla Kondayya and others ... Respondents in S. A.  
No. 1035 (*Plaintiffs*.)

Lakshmanna ... Respondent in S. A.  
No. 1037 (*Plaintiff*.)

*Landlord and Tenant—Well constructed by tenant—Land irrigated by well—Garden crops raised—Garden rate—Payment—Implied Contract—Notice to tenant—Omission to give particulars of date—No material irregularity.*

Venkata  
Narasimha  
Appa Row  
v.

The mere fact that garden rates were paid by the tenant for a few years for land irrigated by means of well constructed by himself would not raise any presumption of an implied contract to pay the said rates; though it would be otherwise if the payments had continued for a long period and the transaction should be attended by other circumstances.

Nalla Kond-  
ayya.

Omission to enter the dates on which the kists are due is not a material irregularity so as to vitiate a notice, provided the fasli with respect to which the rent is due has been correctly given in the notice.

Second appeals from the decrees of the District Court of Kistna in A. S. Nos. 594 and 596 of 1901 presented against the decision of the Court of the Head Assistant Collector of Bezvada in Summary Suits Nos. 93 and 94 of 1901.

\* S. A. Nos. 1035 and 1037 of 1902.

30th November 1903.

Venkata  
Narasimha  
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ayya.

*P. R. Sundara Aiyar* and *P. Nagabhushanam* for appellant.

*V. Krishnaswami Aiyar* and *K. Subramania Sastri* for respondents.

The Court delivered the following

**JUDGMENT** :—In Second Appeals 1035 and 1037 it is urged that there is no clear and distinct finding by the District Judge as to whether the landlord had shown that there was an implied contract between the parties, that notwithstanding the fact that a well had been dug by the tenant garden rates should be paid on the land irrigated by it. As the judgment is not perfectly clear as to this and as the point is an important one, we direct the District Judge to return a finding on the following issue :—“ Was there an implied contract on the part of the defendants to pay jarib rates on lands cultivated by aid of wells dug by themselves.”?

The question as to whether there is or is not an implied contract is one that must be decided on the facts of each case. The mere fact that garden rates had been paid for a few years would not necessarily lead to the inference that there was any such contract. This, it is clear, is the view taken by the judges in *Venkatagiri Raja v. Pitchana*<sup>1</sup>. On the other hand, payment of garden rates for a lengthened period coupled with other circumstances may justify the finding that there was an implied contract. The findings should be arrived at on the evidence on record and should be submitted within 6 weeks from this date. Objections, if any, are to be filed within 7 days.

In second appeals 1035 and 1037 it is urged on behalf of the respondents that the notices served on them were bad inasmuch as they do not show the dates on which the arrears are alleged to have become due. It is the case that such dates are not clearly set out according to the several kists, but as the Fasli with respect to which the rent was due is correctly given, we cannot hold that the omission to enter the dates on which the kists fell due is a material irregularity. It should be noted that in second appeal 1037 of 1902 the distraint for Fasli 1309 is illegal.

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1. I. L. R., 9 M. 27.

## IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(FROM THE CALCUTTA HIGH COURT.)

Present :—Lord Davey, Lord Robertson and Sir Arthur Wilson.

Raj Chunder Sen ... .. Appellant. \*

v.

Gangadas Seal and others. ... .. Respondent.

*Civil Procedure Code, Ss. 368 and 582—Death of defendant (respondent)—Right to sue not surviving—against defendants alone—Application to substitute legal representative—Limitation—Delay—Abatement.*

Raj Chunder  
Sen  
v.  
Gangadas.

Under S. 368, Civil Procedure Code, which is made applicable to appeals if any defendant (respondent) dies before decree and the right to sue does not survive against the surviving defendants (respondents) alone the plaintiff (appellant) should apply to have a specified person whom he alleges to be the legal representative of the deceased substituted for him, but if he fails so to apply within the prescribed period (i. e. 6 months from the death of the deceased) the suit shall abate unless he satisfies the court that he has sufficient cause for not making the application within such period.

Where, therefore, pending an appeal against a decree directing that a sum should be paid to a partner in a suit for taking accounts and winding up a partnership, the respondent to whom money was ordered to be paid died leaving a will, probate of which was granted to his son within the 6 months allowed by law for an application to bring in the legal representative as a party and the appellant only made his application after 6 months from the date of the deceased respondent :—

*Held* (1) The right to sue did not survive against the other defendants (respondents) alone and the appeal could not proceed in the absence of the representative of the deceased respondent.

(2) The appellant had not 6 months from the date the legal representative of the deceased respondent was constituted, but only 6 months from the date of the death of the deceased respondent ;

(3) As the appellant did not show sufficient cause for not filing the application within proper time the appeal abated.

Their LORDSHIPS' JUDGMENT was delivered by

**LORD DAVEY.**—The only question on these consolidated appeals is whether the High Court at Calcutta was right in holding that the suit had abated, and the appeals to that Court could not proceed in the absence of a representative of one of the respondents who had died pending the appeals.

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\* 2nd March. 1904.

Raj Chunder  
Sen  
v.  
Gangadas.

The material facts are as follows :—The suit was in substance for taking the accounts and winding up the affairs of a partnership which had subsisted between the plaintiff and the several defendants to the suit. There were complicated questions as to the respective relations of the parties *inter se*. These preliminary questions were disposed of by the Subordinate Judge, and he thereupon directed the accounts to be taken by a Commissioner. Objections were taken to the report of the Commissioner, and in the result a final decree, dated the 6th July 1896, was made by the Judge, by which it was ordered (so far as material for the present purpose) that a sum of Rs. 9,288 odd should be contributed in certain proportions by the plaintiff (appellant in the first appeal), the defendants Ramgati Dhur and Bissumbhur Poddar (appellants in the second appeal), and certain other parties, and that out of that sum a sum of Rs. 1,740 odd should be paid to Abhoy Churn Chowdhry, one of the defendants, and other payments be made to other parties. The defendants Ramgati Dhur and Bissumbhur Poddar and the plaintiff respectively appealed to the High Court. The defendant Abhoy Churn Chowdhry died on the 9th July 1898, leaving a will, probate of which was granted to his son Nagendra Lal Chowdhry on the 18th November 1898. On the 27th April 1899 application was made by the Appellants in the second appeal for an order for substitution of the name of Nagendra Lal Chowdhry for the deceased defendant on the record. A similar application was made by the first appellant. On the 21st November 1899 these applications were rejected on the ground that they were out of time and no sufficient cause had been shown for the delay. The substantive appeals came on for hearing on the 20th March 1900, when the court held that the appeals had abated and could not therefore proceed. The present appeals are from the decrees then made.

By S. 368 of the Civil Procedure Code, if any defendant dies before decree and the right to sue does not survive against the surviving defendant or defendants alone, the plaintiff may apply to have a specified person whom he alleges to be the legal representative of the deceased substituted for him, and the court is thereupon to enter the name of such person on the record, but it is provided that when the plaintiff fails to make such application within the period prescribed, the suit shall abate, unless he satis-

ties the court that he had sufficient cause for not making the application within such period. Raj Chunder  
Sen.  
v.  
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By S. 582 the words "plaintiff," "defendant," and "suit" include an appellant, respondent, and an appeal respectively.

By S. 66 of the Civil Procedure Code Amendment Act (Act VII of 1888) the period of six months from the date of the death of the deceased defendant is the period prescribed for making an application under S. 368 of the Civil Procedure Code.

It is not disputed that the right to sue did not survive against the other defendants alone, nor could it be successfully contended that the appeals could proceed in the absence of a representative of Abhoy Churn Chowdhry. But applications to substitute his legal representative for the deceased respondent were not made until after the expiration of the period of six months from that respondent's death. The legal representative of Abhoy Churn Chowdhry was constituted nearly two months before the expiration of the period, and there was no apparent difficulty in making the application in proper time. The only question, therefore, could be whether the Court was satisfied that the appellants had sufficient cause for not doing so. No serious attempt was made for this purpose. In the circumstances, therefore, the Court had no option and the present appeals are perfectly idle. Their Lordships will humbly advise His Majesty that they should be dismissed. The appellants will respectively pay the costs of them.

## IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.)

Present:—Lord Davey, Lord Robertson, Sir Arthur Wilson.

Thakurain Jaipal Kunwar and another	...	Appellants*
	v	Defendants.

Bhaiya Inder Bahadur Singh	...	Respondent.
		Plaintiff.

*Specific Relief Act, S. 42—Judicial discretion—Hindu Law—Widow—Execution of will  
Declaratory decree—No ground for reversioner—Discretion exercised—Privy Council  
Practice—Interference with the declaratory decree granted by the lower court—  
Effect of declaratory decree in favour of reversioner.*

Under S. 42 of the Specific Relief Act a claim to a declaratory decree is not a matter of right but rests with the judicial discretion of the courts.

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Jaipal  
Kunwar  
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Inder  
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Singh.

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Inder  
Bahadur  
Singh.

The execution of a will by a limited owner such as a widow is not, as a general rule, a sufficient reason for granting a declaratory decree.

The Privy Council although sitting as a Court of First Instance will not have themselves granted a declaratory decree are always slow to reverse the decisions of the Indian Courts made in the exercise of a discretion entrusted to them by law.

A special reason assigned by the Judicial Committee for refusing to disturb the decisions of the Court below granting a declaratory decree was that although when the will was made by the widow it was doubtful on what ground she relied in making the will it was clear from her conduct in the pleadings that she was setting up a title inconsistent with the rights present or future of any reversionary heir.

A decision in such a suit as to the position of the plaintiff as the next reversionary heir was only a decision as between the parties to the suit and would settle nothing as to who should succeed when the inheritance should open on the death of the widow.

#### Their LORDSHIPS' JUDGMENT was delivered by

SIR ARTHUR WILSON.—This is an appeal against a decree of the Court of the Judicial Commissioner of Oudh, which so far as is now material affirmed the decree of the Subordinate Judge of Bahraich. The point raised is a short one. Indarjit Singh died on the 4th June 1877, possessed of the taluka of Mustafabad, a taluka governed by the Oudh Estates Act (1 of 1869). He left three widows, and under S. 22 (7) of that Act the first appellant as the first married of the widows succeeded to the taluka; the other widows have since died. On the 25th December 1896 the first appellant executed a will by which she purported to declare the second appellant, who is her sister's son, as her heir and successor to the estate; and this will was registered on the 2nd January 1897.

The respondent filed the present suit against the appellants in the Court of the Subordinate Judge of Bahraich. He alleged himself to be the next reversionary heir to the estate, and he set out the pedigree upon which he based his claim to that character. He stated the will of the first appellant, and his contention that it was invalid for the purpose of transferring the estate, and he asked for a declaratory decree to that effect.

The appellants by their joint written statement denied that Indarjit died intestate, and denied that the first appellant was in possession as a Hindu widow. They submitted that the mere exe-

cution of a will did not give the respondent a cause of action to obtain a declaratory decree. They traversed in detail the respondent's pedigree. And they alleged that the first appellant was absolute owner of the estate under an oral will of her husband. On all the points thus raised issues were settled. At the trial the evidence was mainly directed to the proof of the respondent's character as next reversionary heir. The Subordinate Judge found the necessary issues in the respondent's favour, and granted a declaratory decree as prayed; and that decree was affirmed on appeal by the Court of the Judicial Commissioner.

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Singh.

In both the Courts in India it was realised that under S. 42 of the Specific Relief Act, 1877, a claim to a declaratory decree is not a matter of right, but that it rests with the judicial discretion of the Courts; both Courts, however, held that in the exercise of their discretion in the present case the decree ought to be made. The only point raised by the present appeal is that the Courts in India exercised their discretion improperly.

Their Lordships would guard against being thought to lay down that the execution of a will by a limited owner, such as a Hindu widow, as a general rule, affords a sufficient reason for granting a declaratory decree. They are not prepared to concur in all the reasoning of the learned Judges in the present case. And if they had been sitting as a Court of First Instance they would have felt no little hesitation before making the decree that has been made.

But their Lordships are always slow to reverse the decisions of Courts below made in the deliberate exercise of a discretion entrusted to them by law. And in the present case there are special reasons why they should hesitate before so interfering at the instance of the present appellants. The will of the first appellant taken by itself, left it open to doubt on what ground she relied in what she was doing. But when the appellants came to file their written statement, and thereby to define their position and put their own interpretation upon what had gone before, there was no ambiguity left. It was made clear that they relied upon an alleged title in the first appellant inconsistent with any present or future rights of the respondent or any other reversionary heir.



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And, further, the appellants have no legitimate interest in this appeal except in respect of cost; and it is clear that the costs which have been incurred have been caused by the course taken by them throughout the case.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The respondent not having appeared, there will be no order as to costs.

In order to guard against any possible misapprehension hereafter their Lordships think it well to point out that, although in the present case issues have necessarily been raised and decided as to the position of the respondent as next reversionary heir to the taluka, those issues have been raised and decided only between the parties to the suit, and that whenever the inheritance opens by the death of the widow the present decision will have settled nothing as to who should succeed.

## IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(FROM THE CALCUTTA HIGH COURT).

Present :—Lord Macnaghten, Lord Lindley, Sir Andrew Scoble,  
and Sir Arthur Wilson.

Bhola Nath Nundi and others, ... Appellants\*.

v.

The Midnapore Zemindary  
Company, Limited ... Respondent.

*Right of pasturage—Immemorial enjoyment—Presumption—Legal origin.*

A claim by some cultivators of certain villages for a customary and immemorial right of pasturage over the waste lands of the villages or of adjoining villages is not one to establish a right in gross.

On proof of enjoyment from time immemorial a legal origin for the right claimed may be presumed.

Reference to English authorities and application of English principles or doctrines deprecated.

A decree establishing such a right of pasturage will not prevent the owners of the lands affected from improving their property provided sufficient pasturage is left and a provision to that effect may be inserted in the decree itself to prevent future disputes.

\* 26th February 1904.

Their Lordships' Judgment was delivered by

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Nundi

v.  
The Midna-  
pore Zemin-  
dary.

*Lord Macnaghten*.—These are appeals from a judgment of the High Court of Bengal setting aside appellate decrees of the Subordinate Judge of Midnapore, who concurred with the Munsif of Gurbetta, the Judge of First Instance, in his findings on the facts, and affirmed, with a slight variation, the decrees of the lower Court.

After the appeals were presented, Robert Watson and Company, Limited, who were respondents in these appeals, and had been defendants in the Court of First Instance, went into liquidation. Their estates, which were formerly the property of Messrs. Robert Watson and Company, the well-known indigo planters, were transferred to the Midnapore Zemindary Company, Limited, and that Company has now been substituted on the record as respondents in the place of Robert Watson and Company, Limited.

There were originally seven suits. The plaintiffs were different. The lands which were subject of controversy were different. But the question involved was the same in all. The suits were consolidated for the purpose of the hearing, and disposed of by separate decrees.

The plaintiffs were cultivators by occupation belonging to nine villages appertaining to Turuf Paschim, Perguunah Bagri, formerly held by Messrs. Robert Watson and Company, and afterwards by the defendant Company, in *putni* right. They averred that from time immemorial they and their predecessors had enjoyed the right of pasturage over the waste lands of the villages to which they belonged, and, in some cases, over waste lands of adjoining villages. Their complaint was, that in consequence, as they alleged, of some dispute about planting indigo the *putnidars* had denied their title and interfered with the enjoyment of their ancient and undoubted rights.

The case, as presented by the plaintiffs, on the face of it and in substance, seems simple enough. It appears to their Lordships that on proof of the fact of enjoyment from time immemorial there could be no difficulty in the way of the Court finding a legal origin for the right claimed. Unfortunately, however, both in the

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dary.

Munsif's Court, and in the Court of the Subordinate Judge, the question was overlaid, and in some measure obscured, by copious references to English authorities, and by the application of principles or doctrines, more or less refined, founded on legal conceptions not altogether in harmony with Eastern notions. The result is that, although the decrees appear to be justified by the main facts, which both the lower Courts held to be established, it is impossible to say that the judgments delivered are entirely satisfactory.

In the High Court, the learned Judges set aside the decrees of the Subordinate Judge, and remanded the case to him in order that he might decide it in accordance with their observations. The learned Judges did not take upon themselves to dismiss the suits, though the drift of their remarks seems to lead to that result. At the same time they pointed out, properly enough, that they had "not the power to go into facts." It is by no means easy to see what conclusion other than that embodied in the decrees could be arrived at on remand so long as it remains an incontrovertible fact that the right of pasturage claimed has been enjoyed by the plaintiffs and their predecessors from time immemorial—from the time of the Hindu Rajahs—long before the Watsons had anything to do with the property. The learned Judges, in their Lordships' opinion, were justified in rejecting the notion which seems to have been advanced in argument and was adopted by both the lower Courts that the right claimed was a right in gross, but they appear to have been under some misapprehension both as to the character in which the plaintiffs sued and as to the effect of the decrees pronounced by the Subordinate Judge. It was certainly not the intention of the Subordinate Judge or the Munsif that the decrees should prevent the defendants improving their property. And, indeed, the Munsif expressly states that the plaintiffs admitted the right of the defendants to improve their property provided sufficient pasturage were left. Their Lordships think it will be advisable to insert a provision to that effect in the decrees of the Subordinate Judge. It will tend to prevent disputes in future. With this variation the decrees seem to be unobjectionable. Mr. Jardine, for the respondents, said everything that could be said on their behalf. But it was obviously impossible to support the

order of the High Court or to argue that the result would be different if the case went back to the Subordinate Judge on remand.

Bhola Nath  
Nundi  
v.  
The Midna-  
pore Zemin-  
dary.

While their Lordships are unable to concur in the view of the learned Judges of the High Court, they wish to guard themselves against being supposed to adopt all the reasoning on which the decrees of the Subordinate Judge appear to be based.

Their Lordships will humbly advise His Majesty that the decree of the High Court ought to be discharged with costs, and that the decrees of the Subordinate Judge ought to be restored, with an amendment in terms providing in each case that the decree is not to prevent the defendants or their successors in title from cultivating or executing improvements upon the waste lands in question so long as sufficient pasturage is left for the plaintiffs and the other persons entitled to the right of pasturage claimed, with liberty to the parties from time to time, in case of difference, to apply to the Subordinate Judge as they may be advised.

The alteration in the decrees will make no difference in the costs, as the right which it is now proposed to protect by express words has never apparently been disputed. The respondent must pay the costs of appeals.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH).

Present :—Mr. Justice Davies, Mr. Justice Benson and  
Mr. Justice Russell.

Suri Venkatappayya Sastri, agent of Sri

Rajah Rangayya Appa Row Bahadur

Zemindar Garu ...

v.

... *Petitioner (Complain-  
ant in C. C. No. 33  
of 1903 on the file of  
the Stationary Sub-  
Magistrate of Gan-  
navaram).*

Madula Venkanna ...

... *(Accused in do. ).*

*Indian Penal Code, Ss. 22 and 378—Stones quarried from the earth—Moveable property—Theft.*

\* C. R. C. No. 385 of 1903.

(C. R. P. No. 266 of 1903).

3rd February 1904.

Venkatap-  
payya Sastri  
v.  
Madula  
Venkanna.

Any part of the earth whether it be stones or sand or clay or any other component when severed from "earth" is moveable property and is capable of being the subject of theft under S. 378 of the Indian Penal Code.

Land and earth are not synonymous and there is a wide distinction between "earth" and the "earth."

*The Queen v. Tamma Ghantaya*<sup>1</sup>, *Queen-Empress v. Shivram*<sup>2</sup>, and opinion of Brandt J. in *Queen-Empress v. Kotayya*<sup>3</sup> followed. *Queen-Empress v. Kotayya* (opinion majority) not followed.

Petition, under S. 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of the Sessions Court of the Kistna Division in Criminal Revision Petition No. 12 of 1903 presented against the judgment of the Stationary Sub-Magistrate of Gannavaram in Calendar Case No. 33 of 1903.

C. V. Krishnaswami Aiyar for V Krishnaswami Aiyar, vakil for the petitioner.

S. Kasturiranga Aiyangar for P. S. Sivaswami Aiyar, vakil for the accused.

The Court (the Hon. Sir S. Subrahmania Aiyar, *Officiating Chief Justice* and Mr. Russell) made the following

#### ORDER OF REFERENCE TO A FULL BENCH.

Assuming that the accused in this case quarried and carried away the stones dishonestly from the hill, the property of the temple, the question is whether he could be convicted of theft under section 379 of the Indian Penal Code. The Magistrate following the decision in *Queen-Empress v. Kotayya*<sup>3</sup> is of opinion that the offence of theft has not been committed.

This opinion seems to be at variance with the opinion expressed in *The Queen v. Tamma Ghantaya*<sup>1</sup>.

In *Queen-Empress v. Shivram*<sup>2</sup> also a different view is taken. It was therein held that, "Where a person dishonestly carried away 100 cart-loads of earth from the complainant's land he was guilty of theft." We are of opinion that this is the correct view of the law. We, therefore, refer for the decision of a Full Bench

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1. I. L. R., 4 M. 228.      2. I. L. R., 15 B. 702.      3. I. L. R., 10 M. 255.

the question whether on the assumption mentioned above the accused could be convicted of theft.

Venkatap-  
payya Sastri  
v.

Madula  
Venkanna.

OPINION.—In this case the accused was charged with theft in that he dishonestly quarried and carried away stones from land in the possession of another. The Sub-Magistrate discharged the accused on the ground that the stones were not moveable property, and so could not be the subject of theft, and he relied on the ruling in *Queen-Empress v. Kotayya*<sup>1</sup>.

The question referred for our decision is whether, assuming that the stones were quarried and carried away dishonestly, the accused could be convicted of theft under section 379, Indian Penal Code.

We have no doubt but that the answer to this question must be in the affirmative. Under S. 378, Indian Penal Code "Whoever intending to take dishonestly any moveable property out of the possession of any person without that person's consent moves that property in order to such taking, is said to commit theft." The only question is whether the stones in this case are "moveable property." S. 22 enacts that these words "are intended to include corporeal property of every description, except land and things attached to the earth, or permanently fastened to anything which is attached to the earth" and in connection with this definition explanations 1 and 2 to S. 378 provide that "A thing so long as it is attached to the earth, not being moveable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth," and "A moving effected by the same act which effects the severance may be a theft."

We have no doubt but that stones when quarried and carried away are "things severed from the earth" and are "moveable property" and as such are capable of being the subject of theft. Before they were quarried out they formed part of "the earth," and as such they were not moveable property, but as soon as they were quarried out they were "severed from the earth" and became "moveable property." This was the view taken by this Court in the case of *The Queen v. Tamma Ghantaya*<sup>2</sup>. There the Court (*Turner, C. J. and Kernan, J.*) referring to salt

1. I. L. R., 10 M. 255.

2. I. L. R., 4 M. 228.

Venkatap-  
payya Sastri  
v.  
Madula  
Venkanna.

formed spontaneously in a swamp said "We cannot distinguish this case from theft of wood in a reserved forest, except that salt is actually a part of the soil, while trees are not; yet things immoveable become moveable by severance, and this would apply to severed parts of the soil, *e. g.*, stone quarried, minerals, iron or salt collected, as well as timber which has grown, or edifices which have been erected on the land."

In the case of *Queen-Empress v. Kotayya<sup>1</sup> Collins, C.J. and Kernan, J. (Brandt, J. dissentiente)* held that soil dug up by a person not the owner of the land and carried away by him could not be the subject of theft on the ground that such soil was not a thing attached to the earth and then severed from it, but was a part of the earth or land itself, and therefore excepted by section 22 from the corporeal things which were moveable property, and they distinguished the case of *The Queen v. Tamma Ghantaya<sup>2</sup>* on the ground that the salt in the latter case was a natural efflorescence on the surface of the earth—a natural produce attached to the earth. We think that this decision was erroneous and that the learned Judges were misled by supposing that it was the intention of the framers of the Indian Penal Code to reproduce the English law of larceny. The terms of the section show that this was not their intention, and it is by the terms of the section that the law is determined. As recently remarked by the Privy Council in the case of *Gokul Mandar v. Pudmanund Singh<sup>3</sup>*: "The essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction". S. 22 of Indian Penal Code does not except "earth and things attached to the earth" but "land and things attached to the earth." "Land" and "earth" are not synonymous, and there is a wide distinction between "earth" and "the earth." "Earth" may be severed from "the earth" and attached to it again. When "earth" is severed from "the earth" it becomes moveable property. A cart-load of "earth" may be bought any day in the bazaar. Can it be held for a moment that "earth" when thus carted about and sold by one person to another is not moveable property, and is incapable of being the subject of

1. I. L. R., 10 M. 255.

3. I. L. R. 29 Cal., 707.

2. I. L. R., 4 M. 228.

theft? Under the Indian Penal Code it does not matter by whom the severance from "the earth" was made, and the explanation to section 378 expressly provides that "a moving effected by the same act which effects the severance may be theft." It was on these grounds that the Bombay High Court in *Queen-Empress v. Shivram*<sup>1</sup> held that "earth" might be the subject of theft, and the same reasoning applies *a fortiori* to stones that are quarried from "the earth". We think that the view of *Brandt, J.* in *Queen-Empress v. Kotayya*<sup>2</sup> is correct and we hold that any part of "the earth," whether it be stones or sand or clay or any other component, when severed from "the earth" is moveable property, and is capable of being the subject of theft. Our answer to the reference is, therefore, in the affirmative.

Venkatap-  
payya Sastri  
v.  
Madula  
Venkanna.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:— Mr. Justice Bhashyam Aiyangar.

Dorasamy Pillai *alias* Karupa Pillai (minor) by his  
mother and next friend Kalimuthammal ... Petitioner\*  
v. (Plaintiff).

Thungasami Pillai *alias* Kurunatha Pillai and others. Respondents.

Civil Procedure Code, Ss. 378, 462 and 622—Duty of Court with regard to minor—Suit by next friend of minor relating to latter's estate—Infant, position of—Conduct of guardian prejudicial to minor—Duty of Court—Unconditional withdrawal in pursuance of agreement—Agreement within S. 462 voidable—Revision.

Dorasamy  
Pillai  
v.  
Thungasami  
Pillai.

A suit relating to the estate or person of an infant and for his benefit has the effect of making him a ward of Court and, therefore, no act can be done affecting the property of the minor unless under the express or the implied direction of the Court itself. *Rahimbhoy v. Habibbhoy*<sup>3</sup> referred to and approved.

It is the duty of the Court where it finds that the next friend does not do his duty in relation to the suit not to permit him to prejudice the interests of the minor but to adjourn the suit in order that some one interested in the minor may apply on the minor's behalf for the removal of the next friend and appointment of a new one or in order that the minor plaintiff himself may, on coming of age, elect to proceed with the suit or withdraw from it.

\* C. B. P. No. 62 of 1903.

6th November 1903.

1. I. L. R., 15 B., 702.

2. I. L. R., 10 M. 255.

3. I. L. R., 13 B. 137.



Dorassamy  
Pillai  
v.  
Thungasami  
Pillai.

A withdrawal of a suit by the next friend of the minor in pursuance of an agreement or compromise entered into with the defendant without the leave of the Court is voidable at the instance of the minor under S. 462, C. P. C.

An unconditional withdrawal of a suit by the next friend of a minor (without liberty to bring a fresh suit) is an act prejudicial to the minor and ought not to be allowed by a Court, and if so allowed, the High Court will interfere in revision under S. 622, C. P. C., and set it aside. *Ram Sarrup Lal v. Shah Lataput Hosseini*<sup>1</sup> followed.

Petition under S. 622 of the Civil Procedure Code praying the High Court to revise the orders of the Court of the Subordinate Judge of Madura (East) dated 28th July 1902 and 13th October 1902 on C. M. P. Nos. 361 and 425 of 1902, respectively (O. S. No. 60 of 1901).

*C. Ramachandra Rao Sahib* and *M. R. Sankara Aiyar* for petitioner.

*P. S. Sivaswami Aiyar* for respondents.

The Court delivered the following

**JUDGMENT:**—This has been treated as a revision petition not only against the order of the Subordinate Judge, dated the 13th October 1902 but also against his order, dated the 28th July 1902. In passing both these orders it is clear that the Subordinate Judge failed to exercise the jurisdiction which by reason of the petitioner (plaintiff in the suit), being an infant the Court had over the conduct and disposal of the suit and to realize his responsibility in the matter. As observed by *Scott, J.* in *Rahimbhoy v. Habibbhoy*<sup>2</sup>, “a suit relating to the estate or person of an infant and for his benefit has the effect of making, him a Ward of Court.” That being so, no act can be done affecting the property of the minor unless under the express or the implied direction of the court itself (*Story’s Equity jurisprudence* S. 1353.)

S. 446 of the Code of Civil Procedure enacts that if the interest of the next friend is adverse to that of the minor, or if the next friend does not do his duty, or for any other sufficient cause application may be made on behalf of the minor or by a defendant for his removal; and the court may order the next friend to be removed. It is, therefore, the duty of the court, if it finds that the next friend does not do his duty in relation to the suit, not to

1. I. L. R., 29 C. 735.

2. I. L. R. 13 B. 137.

permit him to prejudice the interests of the minor but to adjourn the suit in order that some one interested in the minor may apply on behalf of the minor for the removal of the next friend and appointment of a new next friend, or in order that the minor plaintiff himself may, on coming of age, elect to proceed with the suit or withdraw from it. In the present case on the 28th July 1902 when the case came on for final hearing after several adjournments, the junior vakil who was specially engaged on that very day apparently in virtual supersession of the senior who was present in court presented a petition stating that the plaintiff, or rather his next friend, was unable to conduct the further proceedings in the suit by meeting the necessary expenses and to prove that the whole of the plaint properties belonged to the plaintiff and praying that the court might be pleased to strike the case off the file without further proceedings. This application was granted on that very day and the plaintiff ordered to pay the defendants' costs. It is established beyond all doubt by the evidence of the junior vakil who was examined as a witness on behalf of the respondents in connection with the review petition that he was engaged by the next friend's father, that the judge asked him whether he was going to withdraw unconditionally or he wanted to withdraw with permission to bring a fresh suit and that he, in reply, stated he did not want such permission.

Dorassamy  
Pillai  
v.  
Thungasami  
Pillai.

Assuming that the next friend, the mother of the plaintiff, was aware of the contents of the vakalatnamah authorizing the vakil to withdraw the suit executed that very day outside the precincts of the Court and that she did authorize the vakil to withdraw the suit, it must have been obvious to the Subordinate Judge that, in withdrawing the suit without permission to bring a fresh suit the junior vakil at the instance of the next friend was acting most prejudicially to the interests of the minor, and that is apparently the reason why he pointedly asked the vakil if he wanted permission to bring a fresh suit. It is, therefore, clear that the Subordinate Judge was under the impression that he was bound to allow the withdrawal and dismiss the suit with costs for default of prosecution and that he had no jurisdiction to adjourn the suit in the interests of its Ward. The plaintiff's next friend in her deposition taken in connection with

Dorasamy  
Pillai  
v.  
Thungasami  
Pillai.

the review application states that she was not aware of the contents of the vakalatnamah or of the withdrawal petition both of which bear her mark, and that she became aware of the withdrawal only a day or two after it was withdrawn; and the evidence of the father of the next friend and one of the attesting witnesses to the vakalatnamah is to the effect that the withdrawal was brought about by the 1st defendant himself and that the suit was withdrawn by reason of the 1st defendant having promised to give to the plaintiff his share after the suit was withdrawn. The Subordinate Judge does not discuss the evidence bearing on this question. Under S. 462, Civil Procedure Code, a withdrawal of the suit by the next friend in pursuance of an agreement or a compromise entered into with the defendant without the leave of the Court, will be voidable at the instance of the minor (*Rahimbhoy v. Habibbhoy*<sup>1</sup>). In rejecting the application for review, the Subordinate Judge has evidently overlooked the provisions of S. 462. It is, however, not necessary to call for a finding on this point. For the reasons already stated in connection with the unconditional withdrawal of the suit on the 28th July, 1902, I set aside his order under S. 622, Civil Procedure Code, following the decision of the Calcutta High Court in *Ram Sarrup Lal v. Shah Latapat Hossein*<sup>2</sup>, and direct that the suit be restored to file and proceeded with and disposed of according to law. The respondents must pay the costs of the petitioner both here and in the application for review in the court below.

### IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir S. Subrahmania Aiyar, *Offg. Chief Justice*,  
and Mr. Justice Russel.

V. E. N. K. R. M. A. Venkatachalam

Chettiar ... .. Appellant\* (*Plff.'s*  
v. *representative*).

1. Gaurivallaba Thevar, minor Zamin-  
dar of Sivaganga, by Mr. S. Nagasawmi  
Iyer, Manager under the Court of Wards  
and others ... .. Respondents (*Defts.*).

Venkata-  
chalam  
Chettiar,  
v.  
Gaurivallaba  
Thevar.

*Riparian rights—Injunction—Riparian proprietor—Right to raise bund—Ordinary  
flood—Lands of neighbouring owners affected—Prescriptive right to throw back  
water.*

\* S. A. No. 348 of 1902.

1. I. L. R. 18 B. 137 at 146

5th January 1904.

2. I. L. R., 29 C. 735.

Where the erection of a bund by the plaintiff will have the effect of throwing upon the defendant's land more water than has customarily flowed on to it and of thus increasing the damage to which he has been hitherto subject, the plaintiff will not be entitled to an injunction to restrain the defendant from interfering with the erection of the bund.

Venkata-  
chalam  
Chettiar  
v.  
Gaurivallaba  
Thevar.

Every land owner exposed to the inroads of the sea has the right to protect himself by erecting such works as are necessary for that purpose, and if he acts *bona fide* is not liable for any damage occasioned to his neighbours who must protect themselves.

*Rez. v. Pagham Commissioners*<sup>1</sup>, referred to.

But except in the case of extraordinary floods, such large powers for protection are not given to riparian owners who have a right to protect their lands with reference to ordinary floods only if they do so without injury to others.

*Rez. v. Trafford*<sup>2</sup>, referred to.

A proprietor of land on the bank of a river ought to be restrained from erecting a mound, which, if completed, will in times of ordinary flood throw the waters of the river on to the grounds of a proprietor on the opposite bank so as to overflow and injure them.

*Mensies v. Breadalbane*<sup>3</sup>, followed.

*Per Russel, J.*:—A prescriptive right to throw back water and keep it standing on the land of another exists only in the case of water flowing in a defined stream and cannot apply to surface water not flowing in such a stream.

*Robinson v. Ayya Krishnama Chariar*<sup>4</sup>, followed.

*Semle*:—(Per Subramania Iyer, O. C. J.) A Court will not grant an injunction in plaintiff's favour where there has been nothing more than mere assertions on the one hand and denials on the other as to the right of the plaintiff to raise a bund.

Second appeal from the decree of the District Court of Madurai in A. S. No. 461 of 1901 presented against the decree of the Court of the District Munsif of Sivaganga in O. S. No. 149 of 1900.

*K. Srinivasa Aiyangar* for appellant.

*K. N. Aiya* for respondent.

The Court delivered the following

**JUDGMENT**:—*The Officiating Chief Justice*:—The plaintiff's Inam village and the first defendant's Zamindari village are irriga-

1. 82 B. R. 406.  
2. 34 B. R. 680.

3. 3 Bligh N. S. 414.  
4. 7 M. H. C. 37.

Venkata-  
chalam  
Chettiar  
v.  
Gaurivallaba  
Thevar.  
—  
Offg. Chief  
Justice.

ted by a common tank. As found by both the lower courts, the surplus water of the tank has from time immemorial been discharged through a weir and the water thus discharged passes over some of the lands of both the parties and eventually escapes through a channel separating the two villages. It is further found that if the plaintiff puts up the bund which he proposes to construct in order to save from inundation the portion of his property hitherto affected by the flow of the surplus water, such bund would throw back upon the defendant's land more water than has customarily flowed on to his property and increase the damage to which he has been hitherto subject.

In these circumstances there can be no doubt that the lower courts were right in refusing to grant the injunction prayed for by the plaintiff, to restrain the defendants from interfering with the erection of the proposed bund.

Assuming the plaintiff was entitled to protect his land from inundation by erecting a bund, it would by no means follow that the court would grant an injunction in his favour when there has been nothing more than mere assertions on the one hand and denials on the other as to the right of the plaintiff to raise it. It is, however, unnecessary to say more on this point as the plaintiff has clearly no right to raise any bund in the way proposed by him. Now, having regard to the fact that the surplus waters of the common tank have from time immemorial been discharged so as to overflow certain lands of both the parties, an agreement must be implied as between the owners to the effect that neither can interfere with the accustomed flow of the surplus water so as to increase the burden of the other.

Apart from this, and even were the parties not the owners in common of the tank, the plaintiff would not, according to the authorities, be at liberty to put up the proposed bund. It is quite true that every land owner exposed to the inroads of the sea has the right to protect himself by erecting such works as are necessary for that purpose, and that if he acts *bona fide*, he is not liable for any damage occasioned to his neighbours who must protect themselves (*Re: v. Pagham Commissioners*<sup>1</sup>). But I take it that

1. 8 B. & C. 355; 32 R. R. 406.

the law does not, except in the case of extraordinary floods, give such large powers for protection to riparian owners, it having been distinctly laid down that such owners have a right to protect their lands with reference to ordinary floods, only if they do so without injury to others. (*Rex. v. Trafford*<sup>1</sup>, Cf. also *Ridge v. Midland Railway Co.*<sup>2</sup>, cited in Coulson and Forbes' Law of Waters, 2nd Edn., p. 155).

Venkata-  
chalam  
Chettiar  
v.  
Gaurivallaba  
Thevar.  
—  
Offg. Chief  
Justice.

Here, however, the bund proposed would, as found by the lower courts, affect the defendant's land injuriously. The case is therefore analogous to *Menzies v. Breadalbane*<sup>3</sup>, where the House of Lords, speaking through Lord Lyndhurst, pointed out the similarity between the English, Scotch and Roman Laws bearing on the matter, and held that a proprietor of land on the bank of a river ought to be restrained from erecting a mound, which, if completed, would in times of ordinary flood throw the waters of the river on to the grounds of a proprietor on the opposite bank, so as to overflow and injure them.

This decision of the House of Lords is referred to in *Whalley v. Lancashire and Yorkshire Railway Co.*<sup>4</sup>, as illustrative of the second of the four heads of the classification there adopted by the Master of the Rolls. He observed: "Then we come to the case of having property which is subject to this defect, that unless you can prevent the injury which the ordinary course of nature will bring upon it, by transferring that injury to your neighbour's property, your property must suffer as the natural consequence of its position. That is the case of *Menzies v. Breadalbane*<sup>4</sup> where property was so situated with regard to a river that if the river was left alone with its ordinary flow of water, it must, in the course of nature, eat away the property or occasionally overflow it. If the owner of such property, in order to cure that defect were to do something to his land which by turning the stream out of its ordinary course would throw that defect on his neighbour's land, he would, I think, according to the ordinary principles of law, become liable to pay the damages this

1. 8 Bing 204; 84 R. R. 690.

3. 3 Bligh N. S. 414; 32 R. R. 103.

2. 53 J. P. 55.

4. 13 Q. B. D. 131 (136).

Venkata-  
chalam  
Chettiar  
v.  
Gaurivallaba  
Thevar.  
—  
Offg. Chief  
Justice.

would occasion, and further be prevented from continuing to do it by an injunction."

That is practically the case here. The land of the plaintiff by its situation, has from time immemorial been exposed to the periodical overflow of the water discharged by the weir and, therefore, the owner of such land even if he had no interest in the tank would not be at liberty to construct an embankment such as that proposed, to the injury of the proprietor of lands on the other side.

The case of *Nield v. London and North-Western Ry. Co.*<sup>1</sup> is not in point for the reason that, apart from the water sought to be turned away in that case being extraordinary flood water, neither party to the contest was responsible for the coming in of the water; while here the water which is sought to be kept off by the plaintiff, is the surplus of what comes into the tank in the interest of both the parties and has to be discharged for the safety of the common property—the tank. This circumstance would distinguish the present from the case of *Gopal Reddi v. Chenna Reddi*<sup>2</sup> also.

I feel some difficulty in understanding what the precise *ratio decidendi* of *Gopal Reddi v. Chenna Reddi*<sup>2</sup> is. In one part of his judgment, *Shephard, J.*, observes: "It is found or admitted that it has long been the practice to have some sort of bunds." If this be the real reason for the final decision in the case, it would not be in conflict with *Menzies v. Breadalbane*<sup>3</sup> where the Lord Chancellor distinguished the case of *Farquharson v. Farquharson* on the ground, among others, that the mound in question there was erected on old foundation and that it had been shown that there was a custom of practice of riparian owners in that part of the country to embank against each other. In another part of his judgment, however, *Shephard, J.* says that the stream, when in flood, spread itself over the defendant's lands and did not come in its full volume to the plaintiff's lands. If such spreading was the usual state of things in times of ordinary flood, so as to make the ground on which the spreading took place a part of the regular course of the river in

1. L. R. 10 Ex. 4.  
2. I. L. R., 18 M. 158.

3. 3 Bligh N. S. 414; 32 R. R. 103.

certain seasons of the year, the construction of an embankment which would confine such ordinary flood waters within narrower bounds so as to damage the lands of others, would have been actionable according to *Menzies v. Breadalbane*<sup>1</sup>, and the conclusion in *Gopal Reddi v. Chenna Reddi*<sup>2</sup> would be in conflict therewith; for a stream may have one course ordinarily and a wider course in particular seasons, and any work which interferes even with the latter wider course calculated to injure the property of others would be within the rule laid down by the House of Lords, as pointed out by the Lord Chancellor thus: "The ordinary course of the river is that which it takes at ordinary times; there is also a flood channel; I am not talking of that which it takes in extraordinary or accidental floods, but the ordinary course of the river in the different seasons of the year, must, I apprehend, be subject to the same principle". The distinction thus drawn by the Lord Chancellor between usual or ordinary floods and accidental or extraordinary floods would seem to be denied by *Shephard, J.*, when he observes, "I fail to understand why the periodical rising of a stream, consequent on the fall of rain, should any the less be considered an extraordinary danger." Though thus some portions of his judgment are calculated to create a doubt on the point, yet, I take it that *Shephard, J.*, did not intend to lay down anything inconsistent with *Menzies v. Breadalbane*<sup>1</sup> since the learned Judge in terms says that the act complained of did not divert the stream from its natural course. Be this as it may, the facts of the present case are altogether different from those of *Gopal Reddi v. Chenna Reddi*<sup>2</sup> as will be clear from what has been already stated.

It now remains only to notice the argument on behalf of the appellant that his case was supported by the view of the law accepted by certain American authorities, cited in Angell on Water Courses and Washburn on Easements. But those authorities relate to the improvement of one's land, with reference to surface water strictly such—that is, water due to fall of rain or snow, percolation, etc.—and not flowing in a definite watercourse. On the contrary, the rule that the course of water in a stream including its course in times of ordinary flood should not be changed or obstructed for the benefit of one class of persons to the injury

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1. 3 Bligh N. S. 414.  
2. 1 L. R., 18 M. 158.

3. 3 Bligh N. S. 414 (418).



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of another, seems to be generally admitted in the United States (Angell on Water Courses, 7th Edition, Section 334 and note). It seems to be admitted also that there is no liability in respect of extraordinary floods on the manifest ground that they are (to use the elegant language of Agnew, J., in *Pittsburg Ry. Co. v. Gilliland*<sup>1</sup>, "unexpected visitations whose comings are not foreshadowed by the usual course of nature and must be laid to the account of Providence whose dealings, though they may afflict, wrong no one." In some of the States, however, the Courts have had, from the necessity of the case, to refrain from extending the recognised rule as to the ordinary flood-channel of a river, to the case of some great rivers which periodically bring down huge floods that overflowing the banks, sweep down populous and fertile low lands on either side for miles. In *Kansas City, &c., Ry. Co. v. Smith*<sup>2</sup>, cited by a writer who has recently discussed the subject the matter is put strikingly. There the Supreme Court of Mississippi said :—"If the waters of the Mississippi river which at flood times spread from twenty to forty miles and flow in a continuous and unbroken body down the valley are to be dealt with as the waters of a stream and the whole valley is to be given up as the course way of the stream, the most fertile portion of our State may at once be abandoned. \* \* \*. There are farms innumerable and rail roads, villages, towns and cities situated in a watercourse if the usual course of the flood water of the Mississippi river mark and define the course of that stream. It is manifest that to apply the strict rules of law controlling in cases of streams and the obstruction thereof to such a stream and to such conditions, is in the very nature of things impracticable and impossible. Calling these overwhelming floods surface or channel water for the purpose of dealing with them under rules applicable to entirely different conditions advances us no step in the solution of the question involved. We must deal with things and not names, and conditions inherently and radically different cannot be assimilated by mere terminology." The gist of this argument is that conveyed by the observation of Dr. Hunter, (Roman Law, 2nd Edition, p. 313) that "occasional floodings do not change the legal extent of the bank, otherwise all Egypt would be a bank of the Nile."

1. 73 Am. Dec. 27 (105).

2. 37 Am. L. B. 713 (721).

But the special features of the Mississippi and Nile floods can constitute no good reason for discarding with reference to rivers and streams generally the well established definition that the bank of a river is the furthest reach of the river so long as it keeps within its natural course (Hunter's Roman Law, p. 313); and it is scarcely necessary to say that, as the circumstances of rivers and streams in this Presidency are in no way comparable to those attending the Mississippi, the Nile and the like, they do not warrant a departure from the rule of law laid down by the House of Lords in the case already cited.

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Further, river conservancy legislation (Madras Act VI of 1884) having provided for State interference where such would seem to be necessary for the definition, control and protection of waterways in the country, there would seem to be so much less reason for our courts adopting, on the ground of any public policy, a rule different from that established by authorities ordinarily followed here.

I would accordingly dismiss this appeal with costs.

*Russell, J.*—The District Judge has, I think, given good reasons for the opinion which he holds that this is not a case in which the injunction asked for should be granted. It is within the discretion of the court to grant an injunction or refuse it. The plaintiff has refused to join the 4th defendant at the latter's request in order to deepen the channel F, which would then in all probability carry away all the surplus water of the tauk A running in the direction of F in ordinary times and little or no damage would result to the plaintiff if this were done. Till the plaintiff has done in this respect all that can reasonably be expected of him, I do not think he is entitled to any relief except what the law allows him as a matter of absolute right.

This water which the plaintiff wishes to bund up and throw back on the defendant's land is either running in a defined stream or it is not. If it is running in a defined stream, then the case of *Menzies v. Breadalbane*<sup>1</sup> makes it quite clear that the plaintiff has no right to erect the bund referred to by him. The plaintiff does not seek to protect himself from an extraordinary flood.

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1. 3 Bligh, N. S. 414.

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He wants to protect himself from the ordinary overflow of the common tank. This flow runs in a defined channel and owing to the fact, no doubt, that the surplus channel F is silted up this ordinary surplus water runs on to the plaintiff's land and injures it. It is settled law that "a prescriptive right to throw back water and keep it standing on the land of another exists only in the case of water flowing in a defined stream, and cannot apply to surface water not flowing in such a stream, though it might ultimately, if not arrested, flow into a tank." (*Robinson v. Ayya Kristnama Chariyar*<sup>1</sup>). The plaintiff could in the present case be allowed to erect the bund proposed by him only if he had a prescriptive right to do so and if the water is running in a defined stream. He has no such right for no such bund has ever been erected before. Even, however, if the water is not running in a defined stream, the plaintiff would not under the circumstances be entitled to put up a bund the effect of which would be to throw additional water on to the defendant's land and thus cause greater injury to the defendant than is caused at present. It appears that the surplus water escapes from tank A and runs in a defined channel for about 100 yards. It then divides into three branches and the waters in all the branches more or less diffuse themselves over the surface of the lands they pass through. It is with the southern branch this case is concerned. The watercourse is there clearly marked at intervals. Thus the case is as follows. There is a channel which, in its present state, is insufficient to carry away, without overflowing its banks, all the surplus water flowing into it from the tank A. The flooding of its banks is the normal condition of things. There is no extraordinary flood. The case of *Menzies v. Breadalbane*<sup>2</sup> just quoted shows that the plaintiff cannot be allowed to erect a bund and throw the water which would ordinarily flow on to his land over on to the defendant's land and thus cause an injury to the latter. This is what the plaintiff seeks to do. The obvious remedy is that proposed by the 4th defendant. The parties should join and deepen the common drainage channel.

The appeal is dismissed with costs.

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1. 7 M. H. C., 37 (47).

2. 3 Bligh, N. S. 414.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Davies and Mr. Justice Boddam.

Subbaraya Mudaliar and others ... Appellants\* (*Defts. 1 to 3*).

v.

Vedantachariar and others ... Respondents (*Pliffs. 1 to 6 and Defts. 6 and 12*).

*Civil Procedure Code, S. 11, Explanation—Civil Suit—Suit of a Civil nature—No claim to office or emoluments—Claim to recite certain texts—Mere matter of ritual or religious ceremony—Claim for imaginary damages—Jurisdiction of Civil Courts.*

The whole of an ill-defined community such as all the members of the Vadagalai community wherever residing cannot be entitled to any particular office in a temple or to any emoluments or perquisites thereof.

Where a plaintiff's claim is not to any office or emoluments but is confined to rights in religious ceremonies, the same is not cognisable by the Civil Courts under S. 11, Expln. C. P. C. Even the addition of a claim for damages which is purely imaginary does not bring it within the cognisance of the Civil Courts.

Where the Vadagalais sued for a declaration of their right to recite certain sacred texts in a temple either after or apart from the Tungalais either under usage or under a Rasinama which was only a temporary arrangement and asked for damages which were purely imaginary in respect of perquisites which they alleged they had been prevented from getting, *Held*, the suit was not cognisable by the Civil Courts.

Second appeals from the decree of the Subordinate Judge's Court of Kumbakonam in A. S. Nos. 1084 and 1085 of 1900, presented against the decree of the Court of the District Munsif of Tiruturai in O. S. No. 22 of 1899 (O. S. No. 339 of 1897) on the file of the District Munsif of Negapatam.

*T. Rangachariar* for appellants.

*V. Krishnaswami Aiyar* and *P. R. Sundara Aiyar* for respondents.

The Court delivered the following

**JUDGMENT** :—On the question which we have first to consider, namely, whether this suit is cognisable by a Civil Court, we have no hesitation in deciding that it is not.

The explanation to S. 11 of the Code of Civil Procedure which governs the question runs as follows : " A suit in which the right to property or to an office is contested is a suit of a civil nature notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies."

Now, here the subject of the plaintiff's claim was confined to rights in religious ceremonies, without a claim to any office or any emoluments. The plaintiffs did ask for damages on account of

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perquisites which they had been prevented from getting, but this was a mere fiction, apparently put in to clothe the Court with jurisdiction, for though both the Courts have declared the plaintiffs' rights in other respects, neither Court has declared the plaintiff's rights to any office or to any emoluments. The Subordinate Judge has, it is true, made an addition to the Munsif's decree by giving the plaintiffs Nos. 1 to 6 one anna as nominal damages between them, but this was quite unjustifiable and is as fictitious as the plaintiff's claim itself for damages. The plaintiff's claim was on behalf of all the members of the Vadagalai community wherever residing, numbering many untold thousands, and it is obvious that the whole of an ill-defined community cannot be entitled to any particular office in a particular temple or to any emoluments or perquisites thereof. Hence there is no claim by the plaintiffs for an office and their claim for damages is purely imaginary. The decree of the Courts below after exercising the hypothetical damages granted by the Subordinate Judge is itself a confirmation of our view of what the plaintiffs' claim really was, as it only declares the right of the plaintiffs' community to recite certain sacred texts in the temple in question either after or apart from the Tengalais community. This is clearly a mere matter of ritual or ceremony in a religious matter with which a Civil Court can have nothing to do. The decree makes no declaration in respect to any "right to property or to an office" or to any general right of the Vadagalais to worship in this temple which has never been disputed. The mere fact that the plaintiffs have claimed the declaration they seek in the alternative under the terms of a razinamah (Exhibit E) does not assist them, for this razinamah was entered into in May 1893 between the then heads of the rival sects of Vadagalais and Tengalais residing in Negapatam, to enable certain ceremonies to be performed in the temple in question. That this was only a temporary arrangement made with a view to prevent a breach of the peace appears from the order of the Head Assistant Magistrate of Exhibit XVI dated the 21st July 1893. This agreement cannot, therefore, be treated as a contract binding all the members of both communities wherever residing for all time. For these reasons, we allow these second appeals and dismiss the plaintiffs' suit with costs throughout. The memoranda of objections that have been filed in the cases have not been argued by the plaintiff's pleader.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir S. Subrahmania Aiyar, *Offg. Chief Justice*,  
and Mr. Justice Bhashyam Aiyangar.

Venkayya and another ... Appellants\*  
v. (Plaintiffs).

The Secretary of State for India in Council,  
represented by the Collector of Kistna ... Respondent  
(Defendant).

*Limitation Act (1877), Arts. 18 and 120—Act IX of 1871, Art. 20—Land Acquisition Act I of 1894, Ss. 17 and 48—Act X of 1870, S. 54—Acquisition of land for public purposes—Direction to vest and take possession—Collector's refusal to make award—Suit for damages—Limitation—One year from refusal.* Venkayya v. The Secretary of State for India.

S. 54 of the Land Acquisition Act X of 1870, which corresponds to S. 48 of Act I of 1894, does not include a case in which the land is vested in Government.

Article 18 of the Limitation Act of 1877 (corresponding to Article 20 of Act IX of 1871) refers only to suits for compensation for non-completion and refusal to complete the acquisition referred to in S. 54 of Act X of 1870 (S. 48 of Act I of 1894).

A suit by a person for damages against the Collector for refusing to make an award with respect to land which had become vested in Government by virtue of a direction under S. 17 of Act I of 1894 is not governed by Art. 18, but by Art. 120 of the Limitation Act. and will, therefore, be within time if filed within 6 years from the date of Collector informing the plaintiff of the refusal to make the award.

Where there is a direction under S. 17 of Act I of 1894 and the Collector refuses to make the award, the owner of the land is not entitled to the land but only to damages against the Collector for the breach of a statutory duty.

Second appeal from the decree of the Subordinate Judge's Court of Kistna in A. S. No. 28 of 1901 presented against the decree of the Court of the District Munsif of Bapatla in O. S. No. 297 of 1899.

V. Krishnaswami Aiyar and K. Subramania Sastri for appellants.

The Government Pleader (E. B. Powell) for respondent.

The Court delivered the following

JUDGMENT:—The suit in its alternative character is really a suit for damages for the wrongful refusal by the Collector appointed to acquire the land for public purposes to make an award settling the amount of compensation payable to the appel-

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- lants in respect of the land which, by virtue of a direction made by the Local Government under S. 17 of Act I of 1894, was taken possession of by the Collector before any award had been made and thus became vested absolutely in the Government. The reason for the Collector's refusal was that it had been subsequently discovered that the land belonged to Government and not to the appellants, and therefore the latter were not entitled to compensation. It is now found by both the Lower Courts that the land was the appellants' property and not the property of Government. But as the land vested absolutely in Government under S. 17, though in fact it was as now found the property of the appellants, they are not entitled to recover the land but can only claim damages for breach of a statutory duty on the Collector's part, the measure of damages being such compensation as would have been recovered by the appellants if the Collector in due discharge of his duty had proceeded under the Land Acquisition Act to make the award. The suit, however, was brought more than one year after the Collector informed the appellants that he was not going to make the award as the property belonged to Government and the lower appellate court dismissed the suit as barred by limitation under Art. 18 of the Indian Limitation Act. This Art. 18 reproduces the corresponding Art. 20 of Act IX of 1871 which was passed shortly after the enactment of the Land Acquisition Act, X of 1870, now replaced by Act I of 1894. It seems to us clear by comparing Art. 18 with S. 54 of Act X of 1870 that the suit contemplated by the Act is one for compensation for non-completion and the refusal to complete the acquisition referred to in the said S. 54 which does not include a case in which the land has vested in Government. S. 48 of Act I of 1894 corresponds to S. 54 of Act X of 1870. In the present case the acquisition has been completed in the sense that the property has absolutely vested in Government, and, in our opinion, Art. 18 does not govern such a suit and there being no other article applicable to the case. The general residuary Art. 120 must be held to govern the case. That being so, the suit is not barred by limitation. We must allow the appeal with costs in this and in the lower appellate court and reversing the lower appellate court's decree restore that of the District Munsif.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir S. Subrahmanya Aiyar, *Offg. Chief Justice*,  
and Mr. Justice Boddam.

Gomathi Ammal ... Appellant\* (1st Defendant).

v.

Kuppathayi Ammal ... Respondent (Plaintiff).

*Ends Law*—Nature of daughter's estate—Partition among daughters—Renunciation of right of survivorship—Question of intention—Partition under belief, estate was absolute—No renunciation—Option to purchase.

A daughter has only a limited and qualified estate in her father's estate.

Ordinarily daughters who partition their father's estate have the right of survivorship in the sense that those who survive the others will take the share of the deceased in preference to those who take the deceased's stridhanam.

It is, however, open to such daughters while effecting a partition by apt language to renounce this right of survivorship.

It is a question of intention in each case to be gathered from the deed of partition, if any, and the surrounding circumstances whether the daughters retained or renounced their right of survivorship.

Where a partition was entered into under the belief that the daughters were absolutely entitled to their father's estate (which belief was founded upon the then state of the law in the Madras Presidency) and under the partition deed it was provided that if one daughter should find it necessary to sell her share, the other daughters should be given the option of purchasing the same, but that if they should not be disposed to purchase the same it might be sold to strangers and that from the date of partition the parties should only be connected by blood. :—

Held (1) that there was no renunciation of the right of survivorship which was not within the contemplation of the parties ;

and (2) that the provision to sell the property to a stranger in case the other daughters should not be disposed to purchase the same should not be construed as referring only to a transfer with the consent of all and for purposes which would render a transfer by qualified owners binding upon the reversioners.

Second appeal from the decree of the District Court of Madura in A. S. No. 832 of 1901, presented against the decree of the Court of the District Munsif of Tirumangalam in O. S. No. 334 of 1900.

Three daughters of the original owner divided through their husbands properties left by him. The 3rd daughter died in 1894 ; Avadayammal, the 2nd daughter, died in 1900. The defendants 1

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and 2 were the latter's son's widow and daughter respectively and plaintiff was the last surviving daughter. She sued to recover the share assigned to Avadyammal in a partition alleging that the defendants were not entitled to the properties. The District Munsif decided in plaintiff's favor. There was an appeal only by the 1st defendant and the Sub-Judge dismissed it.

*P. R. Sundara Aiyar and M. R. Sankara Aiyar* for appellant.

*V. Krishnaswami Aiyar, K. N. Aiya and S. Srinivasa Aiyangar* for respondent.

*P. R. Sundara Aiyar* :—My first contention is that the daughter's estate of all three was converted by agreement of parties into an estate in portions of them to last for the lives of all three. My second contention is that whatever was the view as to 0-7-3, as to 0-7-11, the extra share, it was the absolute property of Avadai. (*Officiating C. J.* :—Even as against reversioners?) Yes. I shall now read the document on the construction of which the case depends. Reads Exhibit B. (*Officiating C. J.* :—What does that show?) The last clause shows that the daughters had no further right of survivorship. The document provides for each selling at their pleasure with a right of pre-emption in favour of the other daughters. (*Officiating C. J.* :—The words are "if there was necessity to sell." That shows that the contingency for sale contemplated should be one which will bind reversioners). No. The sale is by one daughter, and not by all. The words only mean "if any of us should desire to sell." With reference to 0-7-1 that was given absolutely to Avadai. (*Officiating C. J.* :—Is she not the eldest?) No. Kuppathayi is the eldest. The gift to Avadai which is absolute in its terms—that at least, stands on a different footing. *Ramakkal v. Ramasami Naiken*<sup>1</sup> and *Kailash Chandra Chuckerbutty v. Kashi Chandra Chuckerbutty*<sup>2</sup>. (*Officiating C. J.* :—The question in short is whether they intended to renounce their right of survivorship in favour of each other?) I cannot put it that way. That would let in the reversioners on one daughter's death. It is a sale by each to the other or it is in the nature of an exchange. (*Officiating C. J.* :—The possibility of succession is that which is given up. There is no sale of any actual property or no exchange). If the parties were under the

1. I. L. R., 22 M. 522.

2. I. L. R., 24 C. 339.

impression of absolute ownership, there can be no doubt that the deed did not reserve any future rights in favour of one with properties taken by the other.

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(*Officiating C. J.*:—That introduces a question of considerable difficulty). There is then a mutual mistake. If they did not know they had a right to release, however wide the language may be, the possibility of future succession cannot be said to have been dealt with—See *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba*<sup>1</sup>. In the *Padmattur* case it was held differently. However they have but a distant bearing on this subject. It has been held that the property would go to her own heirs. (See *Brij Indar Bahadur Singh v. Rane Janki Koer*<sup>2</sup>. As to 0-7-1 at any rate I am entitled.

*V. Krishnaswami Aiyar* for respondent:—Daughters held a widow's estate. An alienation by one even for a proper purpose will not bind others. See *Sri Gajapati Radhamani v. Maharani Sri Pusapati Alakajeswari*<sup>3</sup>. The division gives them the right of alienation which the decision held they would not have otherwise. (*Officiating C. J.*:—If they divided by metes and bounds, cannot they sell for their lives?) They cannot unless there has been a division of the daughter's estate apart from division for convenient enjoyment. The division gives to each power to sell for necessity without asking the consent of the other daughters. (*Officiating C. J.*:—The language of the deed is inconsistent with that view. The sale may be to a stranger at the pleasure of each): The deed does not use the words "from sons, grandsons and so on", nor gives the right of "gift, sale or mortgage." These two indications of absolute property don't exist. It gives power to sell for *அகத்தியம்* (necessity). Whether after this instrument, an alienation by one for *அகத்தியம்* (necessity) will bind the reversioner is a question we need not now discuss. It purports to give power to sell by herself, which power she would not have ordinarily. The document in the earlier clauses speaks of simple enjoyment of each share. Again the 3rd daughter's property was taken on her death by the other two daughters not by her own heir. So far as that property is concerned even now no contention is urged.

1. 3 M. H. C. 424 (437).

2. L. R. 5 I. A. 1.

3. I. L. R., 16 M. (P. C.)

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The 24 Calcutta case uses clear language; it bars the claim of survivorship.

Unless future rights are expressly signed away, the construction should not be in favour of such release. *Soobramania Telavar v. Gokka Teluvar*<sup>1</sup>; *Seelanund Singh v. Hamidoodin*<sup>2</sup>.

I don't know that such possibilities can even be alienated. Transfer of Property Act, S. 6. (*Officiating C. J.*:—That is perhaps wide. See 3 M. H. C. 424 and the other cases<sup>3</sup> above referred to). The Privy Council in *Bhugwan Doobey v. Myna Bae*<sup>4</sup> doubt the validity of such alienations and in the recent case *Lord Davey* says that *spes successionis* cannot be dealt with so as to bind actual reversioners. See *Nund Kishore Lal v. Kanee Ram Tewary*,<sup>5</sup> and *Sham Sundar Lal v. Achhan Kunwari*<sup>6</sup>. (*Officiating C. J.*:—The expectant interest cannot be mortgaged or sold, but they may be released). There is no estoppel here. Assuming a contract against my contentions the defendant is not a person claiming under her and cannot insist upon the contract being carried out for her benefit. 22 M. 522 has therefore no application. There the alienee could insist on the benefit of the contract and on estoppel. There is the rule of construction that if the words are not clear, gift to a woman would be construed in accordance with Hindu notions. See *Mahomed Shumsool v. Shewukram*<sup>6</sup>.

In the first Court the decree was in my favour against the daughter also. She did not appeal. My right as against her became complete. On appeal and second appeal 1st defendant cannot set up the right of one against whom I have a complete right.

*P. R. Sundara Aiyar* in reply:—His title must be proved. His claim was not based on prior possession. He cannot set up a right which he may have acquired.

The Court delivered the following

**JUDGMENT**:—The question in this appeal relates to a 0-7-3 share and a 0-7-1 share in the property which originally belonged to one Venkataraya. After his death his 3 daughters, Kuppu-

1. 5 M. H. C. 437.

2. I. L. R., 8 C. 576.

3. 11 M. I. A. 487.

4. I. L. R., 29 C. 355.

5. I. L. R., 21 A. 71 (80).

6. L. R. 2 I. A. 7.

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thayammal, the plaintiff, Avadayammal and Subbammal succeeded to his property. In 1857 they divided the properties, and at that partition a 0-7-3 share was assigned to Avadayammal, the other daughters taking a 0-8-0 share each, and in consideration of Avadayammal performing the nuptials of Subbammal and the ceremonies connected with their deceased father and carrying on litigation, if any in connection with the property of their father, an extra share of 0-7-1 was assigned to her. In other words, the estate was divided into four shares, two being assigned to Avadayammal and one share to each of the others. Avadayammal being dead, the question is whether the plaintiff, the sole surviving daughter, is not entitled to what had been taken by Avadayammal. Undoubtedly the daughters had only a limited estate, and the partition entered into by them would of course not affect the reversionary right of Venkataraya's heirs. Ordinarily daughters who are parties to a partition amongst themselves of their father's estate, have the right of survivorship in the sense that those who survive the others would take the share of the deceased in preference to those who take the deceased's stridhanam, but as pointed out in *Ramakkal v. Ramasami Naickan*<sup>1</sup>, it is open to persons in the position of these daughters, while effecting the partition by apt words to renounce such right of survivorship. Whether that was done in the present case is a question to be decided with reference to the construction of Exhibit B and the surrounding circumstances. The instrument itself does not proceed on the footing that the daughters had the limited estate which the law gave to them and does not expressly or by implication purport to part with any right which may accrue to one on the death of the others. On the contrary it proceeds on the footing that the right of the parties was absolute and such as involved no idea of survivorship. This view is emphasized by the fact that Exhibit B purports to be a partition between three males, the husbands of the three daughters of Venkataraya, not as agents acting on behalf of the daughters, but as if those males were themselves the owners of the property. Nor is it surprising that the real parties to the transaction thought that they were absolutely entitled, for though according to decisions rendered long after 1857, the estate which a daughter takes by inheritance from her father must be taken to

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have always been a limited and qualified estate, yet it was generally assumed in this Presidency about the time Exhibit B was executed and for some years later that the estate taken by a daughter was her absolute property. See for example Strange's Manual of Hindu Law, 2nd edition, 145. As regards the provision contained in Exhibit B that any party to the instrument finding it necessary to sell her share should give the other parties the option of purchasing it, that also, in our opinion, goes to strengthen the view that the parties supposed the interest taken by them prior to the partition was absolute. The expression 'finding it necessary' in the clause, on which stress was laid in the argument, obviously means nothing more than "having occasion to alienate" and the manifest object of the provision was to give the other parties to the instrument a right of pre-emption. And this is rendered as plain as possible by the express reference made to a sale to strangers in the event of the other parties to the partition not being disposed to avail themselves of the right of pre-emption so given. It is impossible to see how such a provision can, as contended for the appellants, be construed as referring to a transfer with the consent of all and only for purposes which would render a transfer by qualified owners binding upon all the reversioners. Had such been the intention, the terms of the instrument would have been utterly different and the parties could have had no difficulty in finding language capable of conveying their meaning. This being in our view the proper construction to be put on the document, it is impossible for us to hold that the parties to the instrument intended to renounce and did renounce the right of each to take as the father's heir, the share of any deceased daughter on the footing that the estate taken by all the daughters was only a qualified estate. Such right of survivorship must be taken not to have been within the contemplation of the parties when they entered into the partition, they having, as stated above, proceeded on the erroneous view that they had, not a qualified but an absolute estate which carried with it no right of survivorship. The general words in the instrument that thereafter the connection between the parties was to be that of blood only could not be construed as embracing a right of survivorship which *ex hypothesi* was not in the contemplation of the parties and

involving the renunciation thereof. (Compare *Soobramania Telaver v. Gokka Telaver*<sup>1</sup>; *Subbien Pillay v. Arunachala Tiruvengada Pillay*<sup>2</sup> and *Muthuvaduganatha Tevar v. Dorasinga Tevar*<sup>3</sup>).

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It remains to add that the 0-7-1 share assigned to Avadayammal does not stand on a footing different from the assignment of the 0-7-3 share. The reasons for the assignment of the former were merely those for giving her an extra share. Such assignment, did not, as contended for the appellants, operate in effect as a sale thereof under circumstances which would make it binding on all the reversioners in the view that the daughters took only a qualified estate. In our opinion, therefore, on the death of Avadayammal the plaintiff as the then sole surviving daughter of Venkataroya succeeded. The second appeal fails and is dismissed with costs.

#### IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Boddam and Mr. Justice Bhashyam Aiyangar.

Chidambara Mudaliar

... Appellant\* (*Plaintiff*).

v.

Koothaperumal, minor, by his  
guardian Renganatha Konan. Respondent (*2nd Defendant*).

*Hindu Law—Father's debt—Son's liability—Mortgage—Pious obligation of son—Mortgage binding qua mortgage.*

Chidambara  
Mudaliar

A debt incurred by the father if not illegal or immoral is binding upon his son's interest in the family property even during the life-time of the father and any alienation voluntary or involuntary made to discharge that debt is binding upon the son.

v.  
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mal.

A mortgage given for a debt then incurred is binding upon the son as such if it is not illegal or immoral and a suit for sale including the son's share will lie.

*Semi Ayyangar v. Ponnammal*, dissented from.

Second appeal from the decree of the Subordinate Judge's Court of Trichinopoly in Appeal Suit No. 20 of 1901, presented against the decree of the Court of the District Munsif of Trichinopoly in O. S. No. 280 of 1899.

*P. R. Sundara Aiyar* for appellant.

*P. S. Sivaswami Aiyar* for respondent.

*P. R. Sundara Aiyar* :—The Judge is wrong in exonerating the respondent from all liability. He ought to have given a decree at least for money. (*Bhashyam Aiyangar, J.* :—That is only an oversight. Nobody probably pointed out that at least a money decree should be passed against him). Under the Hindu Law the sons

\*S. A. No. 108 of 1902.

28th August 1903.

1. 5 M. H. C. 437 (443).

2. Ibid, 444 (Per Scotland and Holloway, JJ., at p 450).

3. I. L. R., 3 M. 290 (Per Innes, J. at p. 320

and Per Muthusami Iyer, J., at p. 339).

4. I. L. R., 21 M. 28.

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were liable to pay the father's debts. The next step established by the Courts is that the sons could not question an alienation for discharging a liability to which the sons were also liable and which therefore had the effect of exonerating the son from his obligation. The next step was to make the sons liable along with the father at the same time.

The doctrine of antecedent debt is applicable only to alienations. Where there is a debt and the hypothecation or mortgage only secures the debt, the son is liable for the debt and is therefore bound by the security also. (*Bhashyam Aiyangar, J.* :—The whole question is whether there is a debt? Do you claim a decree for sale?) I do, at any rate. *Sami Ayyangar v. Ponnammal*<sup>1</sup> and *Suraj Prasad v. Golab Chand*<sup>2</sup> put the point clearly against me. But they are wrong. The cases cited do not support them. In *Ramasamayya v. Virasami Aiyar*<sup>3</sup> it has been held that the only question which the sons could raise after sale in execution of a decree against the father is the illegality or immorality of the debt. The same principle is applied in *Palani Goundan v. Rangayya Goundan*<sup>4</sup> where the sons sued before the sale of the properties. In this suit if the son had not been made a party, I should have obtained a decree for sale against the mortgagee and then this respondent could only sue on the ground of immorality or illegality of debt. How then could he logically resist a decree for sale. Cases quoted in 21 M. 28 do not support it. The case in *Chinnayya v. Perumal*<sup>5</sup> is a conveyance for money paid at the time.

The Calcutta case (*Khalilal v. Gobid Prosad*<sup>6</sup>) construes the words "antecedent debt" as meaning antecedent to the alienation by court sale, not antecedent to the bond.

Reference was made to *Debi Dat v. Jadu Rai*<sup>7</sup>; *Chintamani Ray v. Kashinath*<sup>8</sup>.

*P. S. Sivaswami Aiyar* :—(*Bhashyam Aiyangar, J.* :—what do you say to the validity of a charge for present advance?) That question does not arise. I would prefer not to answer it. *Suraj Bunsai's* case lays it down. (*Bhashyam Aiyangar, J.* :—That refers only to conveyance of property). 21 M. 222 did not decide this point. This was not raised or considered. 20 C. seems to be explicable as there was antecedent debt. (*Bhashyam*

1. I. L. R., 21 M. 28.  
2. I. L. R., 27 C. 762.  
3. I. L. R., 21 M. 222.  
4. I. L. R., 22 M. 207.

5. I. L. R., 13 M. 51.  
6. I. L. R., 20 C. 328.  
7. I. L. R., 24 A. 459.  
8. I. L. R., 14 B. 320.

*Aiyangar, J.*:—Renewal of a mortgage is not a mortgage for antecedent debt as you insist). It is in this way ; the previous mortgage bonds are binding on sons as debts. The subsequent mortgage is therefore for the discharge of antecedent debts. (*Bhashyam Aiyangar, J.*:—There is no discharge ; it is only a renewal of bond). Reference was made to the unreported case referred to in 21 M. 28. Mayne, 310, pp. 389 and 403. This point has not directly been raised and decided in any of the cases quoted except 21 M. 28 and 27 C. 762. (*Bhashyam Aiyangar, J.*:—There is a debt and the mortgage is only a security. Take this to be a simple mortgage). That will be no worse than a usufructuary mortgage. (*Bhashyam Aiyangar, J.*:—A usufructuary mortgage with a covenant to pay is on the same footing. How is a usufructuary mortgage without a covenant different ?; I would submit the rule must be the same (*Bhashyam Aiyangar, J.*:—In that case there is no debt and the property is not simply security). I submit not. All kinds of mortgages are simply securities for debts. The debt is existing in all cases. (*Bhashyam Aiyangar, J.*:—Why not the son be liable for the debt in such a case also ?) *Suraj Bansi Koer's* case is authority against it as a conveyance includes mortgages also.

*P. R. Sundara Aiyar* in reply :—The cases quoted in 21 M. 28 don't support the view there taken. 24 A. has directly decided the other way. The Bombay Court has always held against the view in 21 M. 28.

The Court delivered the following

**JUDGMENT** :—It is now established by a uniform course of decisions that a debt incurred by the father which is not shown to be illegal or immoral is even during the lifetime of the father binding upon the son's interest in the family property and that any alienation voluntary or involuntary made to discharge the debt is binding upon the son. In the case of a mortgage debt incurred by the father the debt is the primary obligation and is binding upon the son if it is not for an illegal or immoral purpose and the mortgage is only a collateral security for the discharge of the debt either by receipt of the rents and profits by the mortgagee or by causing it to be sold after the debt has become payable. If the debt is binding upon the son the discharge of the debt either by making a usufructuary mortgage, or by enforcing the security by sale is equally binding upon the son inasmuch as he has thereby become exonerated from liability to discharge the debt of the father by

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means of other joint family property. If a sale of joint family property made by the father for the purpose of discharging his debt which is not illegal or immoral is binding, it is difficult to see on what principle it can be held that a mortgage executed by the father as security for the discharge of the debt will not bind the son simply because the debt was not anterior to the mortgage but was incurred at the same time as the mortgage and the mortgage was executed as security therefor. In the case of *Sami Ayyangar v. Ponnammal*<sup>1</sup> it was no doubt held that the mortgage as such will not bind the son's share unless it was executed as security for an antecedent debt, that is, for a debt that existed independently of the mortgage transaction. The authority of this decision has been considerably shaken by the two later decisions of this court in *Ramasamayyan v. Virasami Aiyar*<sup>2</sup> and *Palni Goundan v. Rangayya Goundan*<sup>3</sup> in the next volume, viz., which decide that unless the son shows that the mortgage executed by the father on which the decree was passed against father alone was for an illegal or immoral debt, the mortgage decree as such will bind also the son's share in the mortgage property. The same view has been taken by the Calcutta High Court in *Lala Suraj. Prosad v. Golabchand*<sup>4</sup> and by the Allahabad High Court in *Debi Dat v. Jadu Rai*<sup>5</sup> and by the Bombay High Court in *Ramachandra v. Fakirappa*<sup>6</sup>.

On principle it is difficult to make any distinction between a mortgage given for an antecedent debt and a mortgage given for a debt then incurred, for in either case the debt is binding upon the son and the enforcement of the security exonerates the son from the burden of the father's debt. Such a distinction does not really afford any protection to the son for his share in the mortgage property can as a general rule be seized and brought to sale, even in the latter case for the recovery of the debt as a *personal* debt due by the father (though also secured by a mortgage) unless such share has been validly alienated in favour of a third party since the date of the mortgage but prior to its attachment.

We, therefore, allow this appeal and reversing the decree of the lower Appellate Court in so far as it modifies the decree of the District Munsif, we restore the decree of the District Munsif with costs in this and in the Lower Appellate Court.

1. I. L. R., 21 M. 28.

2. I. L. R., 21 M. 222.

3. I. L. R., 22 M. 207.

4. I. L. R., 28 C. 517.

5. I. L. R., 24 A. 459.

6. 2 B. L. R. 450.

## IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(FROM THE CALCUTTA HIGH COURT).

Present :—Lord Davey, Lord Robertson and Sir Arthur Wilson.

Srish Chandra Roy and others... *Appellants.\**

v.

Roy Banomali Rai Bahadur ... *Respondent.*

*Specific performance—Compromise—Consideration—Security of title and immunity from future attacks—Conduct of party derogatory of rights under compromise—Failure of consideration.*

Srish Chandra  
Roy  
v.  
Roy Bano-  
mali Rai  
Bahadur.

A compromise of a suit made between the adopted son of the last male owner and an alienee who was a reversioner and who would have been the presumptive reversioner but for the adoption, to the effect that the alienee should not question the title of the adopted son thereafter, and that the latter should confirm a portion of the patni leases and also agree to settle on the wife of the alienee benami for the latter in permanent ijara certain other properties when it should come into his khas possession is not for an executed consideration.

The consideration for the compromise was to obtain security of the adopted son's title to the Zemindari and immunity from future attacks, and where the alienee immediately after such compromise questioned the title of the adopted son, there was a failure of consideration so as to disentitle the alienee and his heirs from claiming specific performance of the remaining parts of the agreement.

Although there is no necessary inconsistency in a party who has unsuccessfully tried to rescind an agreement afterwards claiming performance of it, yet where the conduct of the party is such as to amount to a total failure of consideration and is at variance with and amounts to a subversion of the relation intended to be established by the agreement, he will not be entitled to claim specific performance.

The Judgment of their Lordships was delivered by

**LORD DAVEY :—**The suit out of which this appeal has arisen was one for specific performance of an agreement, dated the 20th May 1861, whereby Banwari Lal Roy, the father of the respondent, promised that when certain mehals (referred to in the case as Dhulauri) should come back into his khas possession, he would settle the same on Srijuta Govinda Pyari Dasi (the mother of the appellants) and her heirs in permanent ijara at a rental of Rs. 1,001. It is alleged in the plaint, and it is clearly established by the documents in evidence, that this agreement was part of a compromise made between Banwari Lal Roy and Krishna Behari Roy (the husband

\* 23rd March 1904.

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v.  
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Bahadur.

of Govinda and father of the appellants), and formed part of the consideration for that compromise. The respondent refuses specific performance on the ground of failure of consideration and other equitable grounds.

The facts of the case are as follows:—Gour Sundar Roy died in February or March 1834 childless, but leaving his mother, Hemlata Chowdhurani, and a widow, Brajeswari Chowdhurani, surviving. After his death Brajeswari adopted Banwari Lal Roy as the son of Gour Sundar. But for this adoption, Krishna Behari Roy would have been the heir of Gour Sundar, and subject to the interests of the latter's mother and widow, would have succeeded to his estate. Hemlata appears to have assumed the management of the estate, and she purported to grant, but without any apparent authority to do so, four permanent leases of parts thereof, including leases of two mehals called Narsingpara and Sagandaba to Krishna. After Banwari Lal came of age, he made an arrangement with Brajeswari by which six annas of the estate were granted to her for her life for maintenance.

In the month of May 1861, Banwari Lal instituted a suit against Krishna to set aside the ijaras or permanent leases granted to him by Hemlata; and also instituted similar suits against the holders of the other permanent leases granted by her. A compromise was thereupon come to between Banwari Lal and Krishna, the terms of which are contained in four documents, dated the 20th and the 22nd May 1861.

The documents dated the 20th May 1861 were: (1) The agreement now sued on. It should be mentioned that the property comprised in this agreement was included in the six annas granted to Brajeswari for her life, and would not therefore come into the khas possession of Banwari Lal until her death. (2) A patnipottah, or permanent lease, of other mehals also in favour of Govinda, at a total rent of Rs. 689-4-0 upon payment of a premium of Rs. 1,301.

An ekrar, dated the 22nd May 1861, was then executed by Krishna in favour of Banwari Lal. It recited (amongst other things) that Brajeswari duly adopted Banwari Lal under the power contained in an *anumatipatra* executed in her favour by Gour

Sundar on the 28th Magh 1240 B. S. It also recited the institution of a suit in 1858 by one Ganga Prasad Roy impeaching the *anumatipatra* and Banwari Lal's adoption, which was dismissed apparently on the ground that even if the adoption was invalid, Ganga Prasad Roy had no title in the life-time of Krishna. The *ekrar* then continues as follows :—

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Roy  
v.  
Roy Banor-  
mali Rai  
Bahadur.

“I, of course, made no mention of the *anumatipatra* granted by the late Gour Sundar Roy, and of your adoption, in my application to *intervene* in the said suit. Still as I consider it necessary to give you some proof that I do not in any manner or mode deny or refuse to acknowledge the truth of the said events, I execute this *ekrar* in your favour, in which I say that the said Gour Sundar Roy did, in fact, execute in favour of his wife Brajeswari Chowdharni the said *anumatipatra*, and that in pursuance thereof, the said Chowdharni, following the terms of the said *anumatipatra*, and with the permission and consent of her mother-in-law, the said Hemlata Chowdharni, received you as a gift, under a deed of gift, and adopted you as a son according to the prescribed rites, and I, by way of attesting the said deed of gift as a witness, have placed my signature and affixed my seal amongst the witnesses, and I fully admit the truth of the *anumatipatra* executed by the late Gour Sundar Roy and of your adoption. And I also admit the correctness of the statement made by Brajeswari Chowdharni to the effect that her husband, the said Gour Sundar Roy, had executed an *anumatipatra* in her favour to adopt a son, and that she had, in pursuance thereof, duly adopted you as a son, after having received you as a gift, and acknowledging you the lawful heir of the late Gour Sundar Roy, in her *ekrar* in your favour, dated the 29th Sraban 1264 B. S. which was filed in Suit No. 36 of 1856 of the Court of the Principal Saddar Amin of this District. And you, as the adopted son of the late Gour Sundar Roy, now hold and will for ever hold to sons and grandsons and others in course of succession as owner, having the rights of gift and sale, the moveable and immoveable properties left by him. To the said properties, I and my heirs do not have, nor will ever have, any claims or objection. If my heirs at any time in future do ever advance any claims, it shall be rejected. To this effect I execute the *ekrar*. Finis, dated the 10th Jeyt.”

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Roy  
v.  
Roy Banomali Bai  
Behadur.**

On the same 22nd May 1861, Krishna filed a Selehnama in Banwari Lal's suit against him, from which it appeared that Banwari Lal had agreed to ratify the lease of Narasingpara on receipt of a narzarana of Rs. 1,500 and Krishna on the other hand surrendered the lease of Sayandaba. The document concludes as follows:—

I file also with this petition the ekrar which I have executed to-day on proper stamp in favour of the plaintiff containing my admissions of the authority to adopt which the late Gour Sunder Roy executed in favour of his wife, Brajeswari Chowdhurani, and of the fact of due adoption by her of the plaintiff in pursuance thereof, and I pray that, on reading my petitions, etc., and also the petition which the plaintiff is filing, the plaintiff's claim for khas possession in respect of the aforesaid Sayandaha methal may be decreed, and his claim in respect of the remaining melhals may be dismissed.

It is stated in the judgment of Mr. Justice Hill, in the High Court, that Krishna in his defence to Banwari Lal's suit had impeached the adoption of Banwari Lal. And no doubt that was so, though the written statement is not in the record. But however that may be, it is plain from the documents which have been referred to that it was at least known or feared that Krishna intended to do so. And their Lordships have no hesitation in inferring that the principal object of Banwari Lal in entering into the compromise was to obtain from Krishna a clear admission of his title to the Zemindari and immunity in the future from attacks upon his title from that quarter.

Within a short time, however, after making this compromise, Krishna applied for leave to intervene in Banwari Lal's then pending suits against the holders of the other permanent leases purporting to have been granted by Hemlata, and was made a defendant therein. He thereupon filed written statements in both suits impeaching the adoption and alleging that the ekrar of 22nd May, 1861, had been obtained from him by fraud. The Court found against him on both points and decrees were made in favour of Banwari Lal. Krishna appealed to the District Judge and thence to the High Court without success. In February 1871, he

instituted a suit of his own against Banwari Lal and his adoptive mother for the purpose of setting aside the adoption and obtaining a declaration of his own title as reversionary heir to Gour Sundar. His plaint and subsequent written statement contained charges of fraud and misrepresentation against both the defendants, the details of which it is unnecessary to consider. The suit was dismissed by the District Judge and an appeal by Krishna to the High Court was also dismissed. He then appealed to Her late Majesty in Council, but without success.

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Roy  
v.  
Roy Banomali Rai  
Bahadur.

Govinda died in 1878. Banwari Lal died in 1880, and the present respondent is his heir. Brajeswari died in 1894 and Krishna died in 1895.

The present suit was heard by the Additional Subordinate Judge of Pabna and Bogra, who by his decree, dated the 31st January 1899, dismissed it with costs. That decree was affirmed on appeal to the High Court, and the present appeal is from the decree of the latter Court, dated the 9th July 1901.

The appellants sue as heirs both of Govinda and of Krishna, and the first point of the appellant's counsel was, that Govinda was entitled in her own right to the reversionary lease, and her title was not affected by the conduct of Krishna. In the High Court, Mr. Justice Hill stated that the case of the appellants "here as in the court below was, that the agreement was between their father and Banwari Lal, their mother, Gobinda Pyari Dasi, being named merely as a benamidar for the former, and it is in the character of his representatives that they sought, and still seek, to enforce the agreement." Without the statement their Lordships would have no difficulty in drawing the inference from the circumstances of the case that it was a benami transaction. In any case Govinda was not a purchaser from Krishna, and she could not have any better right or title than Krishna himself.

The second and principal point of the appellants was characterized by more boldness than plausibility. It was that Banwari Lal had received the full benefit of the compromise by being armed with the ekrar as a shield against the attacks of Krishna, and therefore the agreement in suit was for an executed consideration with the result that the respondent was in the position of a trustee

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 Roy  
 v.  
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 mali Rai  
 Bahadur.

for them. Their Lordships are not prepared to lay down as an abstract proposition that there is any necessary inconsistency in a party who has unsuccessfully tried to rescind an agreement afterwards claiming performance of it. But in the present case they think that Krishna not only tried to deprive Banwari Lal of the benefit of the agreement, but in a large measure succeeded in doing so. The security of his title to the Zemindari was of immeasurably greater importance to Banwari Lal than the mere question of the justice. And their Lordships have already expressed their opinion that the principal consideration to Banwari Lal for the agreement was to obtain such security and immunity from future attacks. In short they do not give the ekrar the restricted effect suggested by the learned counsel, but they think that its language necessarily imports an agreement by Krishna to abstain from questioning the validity of the adoption for the future.

Their Lordships are of opinion that there has been a failure of the consideration for the agreement in suit and also that the conduct of Krishna was at variance with, and amounted to a subversion of, the relation intended to be established by the compromise.

They will, therefore, humbly advise His Majesty that this appeal should be dismissed, and the appellants will pay the costs of it.

## IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.)

Present :—Lord Davey, Lord Robertson and Sir Arthur Wilson.

Thakur Ganesh Baksh    ...    ...    ... Appellants.\*

v.

Thakur Harihar Baksh    ...    ...    ... Respondent.

Thakur Ga-  
 nesh Baksh  
 v.  
 Thakur Hari-  
 har Baksh.

*Interest Act of 1839—Status of under-proprietor recognised by agreement—Agreement merged in decree—Failure to pay rent—No breach of contract—Terms of Subsequent Act not to be imported—Oudh Rent Act XXII of 1886 S. 141—Under-proprietor no tenant—Conditions for claiming interest under Interest Act—Written instrument—Money payable on a day certain—Instrument to contain day or basis.*

\* 23rd March 1904.

Where parties enter into a compromise by which the status of one party as under-proprietor is recognised and a certain amount of rent is made payable to the other party and the compromise is carried into effect by a decree being passed in accordance therewith, the agreement is merged in the decree and the obligation to pay rent is derived from the status of under-proprietor established by the decree,

Thakur Ga-  
nesh Baksh  
v.  
Thakur Hari-  
har Baksh.

Where rent is not paid a suit for recovery of rent and for interest on arrears is not a suit for breach of contract within the meaning of S. 73 of the Contract Act.

An under-proprietor is not a tenant within the meaning of S. 141 of the Oudh Rent Act of 1886 (XXII of 1886) and will not be liable under that section to pay interest on arrears.

*Muhammad Siddiq Khan v. Muhammad Nasir-ul-lah Khan*<sup>1</sup> referred to.

But the Oudh Rent Act does not exclude any liability for payment of interest which the under-proprietor may be under apart from the Act. S. 12 of the Oudh Rent Act, 1886, provides that, unless otherwise agreed the rent payable to the proprietor by the under-proprietor shall be held to become due one month before the date fixed for the payment of the revenue on account of the village in which the land is situate.

A Court ought not to read into an agreement a section in an Act subsequently passed.

Where a compromise and decree of 1864 did not prescribe any time for payment of rent, the provisions of S. 12 of the Oudh Rent Act could not be imported into them.

The Interest Act of 1839 was passed for the purpose of extending to India the provisions of the English Act 3 & 4 W. IV. C. 42 and the words of two Acts being the same, the English decisions may be referred to as a guide in construing the Indian Act.

Where an agreement though it did not contain any express day for payment of a sum certain did not even contain or refer to any basis by calculating which a certain date for payment might be arrived at no interest could be claimed under the Interest Act.

*Quære*:—In order to claim the benefit of the Interest Act, is it necessary that the actual day for payment must be fixed in the written instrument itself: (see *The London Chatham and Dover Railway Company v. The South Eastern Railway Company*<sup>3</sup> *Merchant Shipping Company v. Armitage*<sup>2</sup>) or is it enough if the basis of calculation which is to make the day of payment certain is to be found in the instrument although the actual day of payment is not found in it (see *Duncombe v. The Brighton Club and Norfolk Hotel Company*<sup>4</sup>.)

The judgment of their Lordships was delivered by

LORD DAVEY :—The respondent, Thakur Haribar Baksh, is the Taluqdar of Sarora in Oudh, and the appellant, Thakur Ganesh

1. I. L. R., 26 I. A. 45.

2. (1892), 1 Ch. 120.

3. I. L. R., 9 Q. B. 99.

4. I. L. R., 10 Q. B. 371.



Thakur Ganesb Baksh  
v.  
Thakur Harihar Baksh.

Baksh, is an under-proprietor on the same estate. The questions raised by the present appeal are, whether the appellant is liable to pay rent jointly with one Gadadhar Baksh Singh, or each of them is liable separately for his own share only, and whether he is liable to pay interest on arrears of rent, and, if so at what rate. The Counsel for the appellant, however, admitted that the first question was *res judicata*, and the only question left for the decision of their Lordships is as to the interest.

In the year 1863 litigation took place in the Court of the Settlement Officer at Sitapur between Ganga Baksh, the father of the respondent, and the then taluqdar on the one side, and Bisheshar Baksh, his first cousin, and Uman Pershad, his paternal uncle, on the other. The claim is stated to have been for recovery of possession of certain villages in possession of the latter parties, and the provision for them of maintenance in cash. A compromise was effected by an agreement, dated the 4th May 1864 on the basis of Bisbeshar Baksh and Uman Pershad each taking one-fourth of the estate and paying to Ganga Baksh half of the Government revenue with the addition of 10 per cent. Talukdari dues on the present Government revenue, or which might be fixed from time to time. The Settlement Officer made a decree, dated the 6th May 1864, according to the terms of the agreement, and directed the parties to file a statement showing how they proposed to allot the undivided villages. This was done and the Settlement Officer made his final decree on the 14th December 1864.

Bisheshar Baksh died childless in November 1865, and on the death of his widow Uman Pershad succeeded, after litigation to Bisheshar's share of the under-proprietary estate. On the death of Uman Pershad, the under proprietary estate again became divided between his sons Jang Bahadur and the appellant, and on the death of the former he was succeeded by his son Gadadhar Baksh. A partition was effected between the appellant and Gadadhar Baksh, and they obtained separate possession of the villages allotted to them. Thenceforward the appellant and Gadadhar Baksh maintained that they were no longer jointly liable for the whole rent of the under-proprietary estate, but only for their separate shares. The respondent, on the other hand, insisted on holding them jointly liable for the whole. The under-

proprietors tendered their shares of the rent and their tenders were refused, and suits for the rent were brought by the respondent against the appellant and Gadadhar in 1896 and again in 1898.

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nesh Baksh  
v.  
Thakur Hari-  
har Baksh.

In the suit of 1896 the Deputy Commissioner by his judgment, dated the 8th April 1896 decided that the appellant and Gadadhar Baksh were jointly liable for the rent, but that the Taluqdar was not entitled to interest on the arrears. This judgment seems to have been affirmed on appeal, but Mr. Ross stated that the judgment, though printed in the record, was not put in evidence. It is, however, immaterial because the judgment relied on as *res judicata* on the joint liability is that of the Deputy Commissioner.

In the suit of 1898, Mr. Chameir the Second Additional Judicial Commissioner, by his judgment, dated 27th June 1898, decided on appeal from the District Judge that the deed of compromise of the 4th May 1864 was a contract to pay the rent, and that the respondent was entitled to recover interest by way of damages for the breach of that contract.

The present suit was also one for payment of rent under similar circumstances. The Deputy Commissioner by his judgment, dated the 11th August 1898 held that the respondent was entitled to interest following Mr. Chamier's judgment in the previous case, and that the question of the joint liability of the defendants was *res judicata*. The decree founded on this judgment, which was, dated the 18th August 1898, was, on the 19th August 1899, affirmed on appeal by the present appellant alone on the same grounds.

The judgment of the 27th June 1898 was not, and probably could not have been, given in evidence by the respondent as an estoppel against the appellant, or in bar of the present suits. Their Lordships, therefore, are not precluded from deciding the question of interest on its merits.

In the argument before their Lordships the liability to interest was maintained by the respondent as well on the Interest Act of 1839, (Act XXXII of 1839) as on S. 73 of the Indian Contract Act 1872, and on the other hand it was contended that under S. 141 of the Oudh Act of 1886 (Act XXII of 1886) no interest was payable on arrears of rent by the under-proprietor, and the decision of this Board in *Muhammad Siddiq Khan v. Muhammad Nasir-ul-lah Khan*<sup>1</sup> was relied on.

1. 26 L. A. 45.

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har Baksh.

By S. 141 of the Act of 1886 it is provided that when an arrear of rent remains due from any tenant, he shall be liable to pay interest on the arrear at the rate of 1 per cent. *per mensem*. And it was decided by this Board that an under-proprietor is not a tenant within the meaning of that section. But there is nothing in the Act or in the decision referred to which excludes any liability for payment of interest which the under-proprietor might be under apart from the Act.

With regard to the Contract Act, their Lordships observe that neither of the present litigants was party to the deed of compromise, nor have they, in fact, made any contract with each other. The whole of the proceedings in the suit of 1863 are not before their Lordships, but the suit is said to have been "decided on 6th April 1864," and the compromise which was subsequently come to may have been executed for settling details in order to carry into effect the previous decision of the Settlement Officer. But, however this may be, it appears to their Lordships that the terms of the agreement were carried into effect by the subsequent decree, and the agreement, was in fact, merged in the decree. In other words, the obligation of the appellant to pay the rent is derived from the status of under-proprietor, which was established by the decree, and not from the previous agreement, which furnished the materials upon which the decree is based. Their Lordships are therefore of opinion that this is not a suit for breach of contract within the meaning of S. 73 of the Indian Contract Act.

In order to avail himself of the provisions of the Interest Act of 1880, the respondent must show that the rent was payable by the appellant "by virtue of some written instrument "at a certain time." Neither the deed of compromise nor the decree prescribed any time for the payment of the rent or contained any terms from which the time could be ascertained. But it was said that the court should incorporate in, or read into, one or other of these instruments the provision contained in S. 12 of the Oudh Rent Act, 1886, that, unless otherwise agreed, the rent payable to the proprietor by the under-proprietor shall be held to become due one month before the date fixed for the payment of the revenue on account of the village in which the land is situate. It would be a novel proceeding to read into an agreement a

section in an Act subsequently passed. Nor would it help the respondent in the present case. The Interest Act was passed for the purpose of extending to India the provisions of the English Act (3 & 4 Will IV., C. 42), and the words above quoted are the same as those in the English Act. The English decisions on that Act may therefore be referred to as a guide in construing the Indian Act. In *Duncombe v. The Brighton Club and Norfolk Hotel Company*<sup>1</sup>, it was decided in the Queen's Bench (*dissentiente Blackburn, J.*) that the actual day for payment need not be fixed in the instrument if the basis of the calculation which was to make it certain was to be found in the instrument itself. In *The London, Chatham and Dover Railway Company v. The South Eastern Railway Company*<sup>2</sup>, it was pointed out that this decision was inconsistent with a previous decision of the Exchequer Chamber in *Merchant Shipping Company v. Armitage*<sup>3</sup>, which appears to have been overlooked by the learned judges. In that case it was held that it was necessary that the actual day for payment should be fixed by the written instrument, and that was the view expressed by *Blackburn J.*, in *Duncombe v. The Brighton Club and Norfolk Hotel Company*<sup>1</sup>. Their Lordships have not to say which of these two decisions they prefer, for either of them is fatal to the argument of the respondent.

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Thakur Harihar Baksh.

Their Lordships are therefore of opinion that interest is not payable on the arrears of rent found due from the appellant and Gadadhar Baksh Singh, and they will humbly advise His Majesty that the decree of the court of the Judicial Commissioner of Oudh, dated the 19th August 1899, be discharged, and instead thereof it be ordered that the decree of the Deputy Commissioner of the 18th August 1898, as subsequently amended, be varied by omitting the direction therein contained for payment of interest on the sum thereby found due from the appellant and Gadadhar Baksh Singh and that with this variation the decree be affirmed. As the appellant has failed on one point and succeeded on the other one, their Lordships will further advise His Majesty that there should be no costs of appeal to the Court of the Judicial Commissioner. And there will be no costs of this appeal.

1. L. R., 10 Q. B. 371.

2. (1892) 1 Ch. 120.

3. L. R., 9 Q. B. 90.

## IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(FROM THE CALCUTTA HIGH COURT).

Present :—Lord Davey, Lord Robertson, Sir Arthur Wilson.

Durga Prasad and others ... Appellants\* (*Plaintiffs*).

v.

Bhajan Lal and others ... Respondents (*Defendants*).

**Durga Prasad** *Contract of sale of goods in India—Parol evidence—Bought and sold notes—Fraudulent intention in such notes—Trick practised by vendor—Right to claim damages—*  
**Bhajan Lal.** *Evidence Act, S. 92—Appellate Court seized of whole case—Substantial justice.*

In India a contract of sale of goods can be proved by parol.

Where such contract is completed by bought and sold notes which are however falsified by a trick practised by the vendor on the buyer, the latter will be entitled to disregard them and prove his contract by other and antecedent material.

Where a contract to purchase a cargo of Russian Kerosine oil was entered into by means of telegrams and the transaction was completed by the exchange of bought and sold notes between the buyer and the broker as representing the vendor and the latter by a fraud or trick practised on the buyer inserted in the bought and sold notes 100,000 cases of oil whereas in reality the cargo amounted to 125,000,0 cases, and on the vendor refusing to deliver the whole cargo, the purchaser brought a suit for a declaration or for damages that he was entitled to the whole cargo, for rectification of the bought and sold notes and for further relief :—

*Held*, (1) that the right of the buyer being for the whole cargo or for damages upon the contract did not depend either for constitution or evidence on the bought and sold notes and was not affected by the trick practised on him in the said notes.

(2) that the action was not founded on the bought and sold notes and that therefore no rectification was needed.

(3) that where the first Court awarded a decree for damages in favor of the aggrieved purchaser but did not mention anything about the prayer for rectification, the appellate court on the appeal of the vendor was possessed of the whole case and was not entitled to say that it was unable to do justice to the buyer on the ground that the first court refused the rectification and that the buyer did not appeal therefrom.

and (4) that S. 92 of the Evidence Act had no application to the case.

\* 23rd March 1904.

The judgment of their Lordships was delivered by

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LOED ROBERTSON :—The facts in this case, as found by the Courts, are simple and very cogent.

In October 1899 (the matter being brought to a final conclusion on 30th October 1899), the appellant Sureka bought from the respondents the whole of a certain cargo of Russian kerosine oil, which the respondents had themselves bought from merchants named Graham & Co. at 50 pence per case. Seeing that the market was rising, and repenting them of their bargain, the respondents, by fraud, inserted in the bought and sold notes the figures 100,000 cases, as descriptive of the quantity of oil sold, whereas the truth was that the cargo amounted to 125,000. This opportunity of fraud came the respondents' way, because the original sellers (Messrs. Graham & Co.) did not fall in with, or at least were said by the respondents not to fall in with, the arrangement first proposed, *viz.*, that the original sale by them should be simply transferred to the appellant Sureka as buyer. Accordingly the bought and sold notes were signed, the appellant Sureka only discovering afterwards that instead of recording the contract they falsely stated it.

In this state of the facts, the right of the purchaser was indisputable, *viz.*, to have the whole cargo, or damages. The trick practised on him in the bought and sold notes had no legal effect on his original right. Nor did that right depend either for constitution or for evidence on the bought and sold notes. In India a contract of sale of goods can be proved by parol; and the bought and sold notes having in this instance been falsified, the aggrieved purchaser was entitled to disregard them and prove his contract by other and antecedent material. This he has done conclusively by the evidence of the broker and by the telegrams.

The appellant Sureka came into Court on 15th January 1900 with a plaint, in which he prayed, *inter alia* :—

(a) That it be declared that under the said contract entered into by and between him and the defendants, dated the said 1st day of November 1899, the plaintiff is entitled at the rate of 50 pence per case, to the whole of the said cargo sold to the defendants as aforesaid.

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(b) That the defendants be decreed to make over possession to the plaintiff of the whole of the said cargo, on his paying them for the same at the rate of 50 pence per case, which payment the plaintiff had always been and is now ready and willing and hereby offers to make.

(c) That, if necessary, the said bought and sole notes be rectified and varied by the substitution of words and figures "one full cargo containing say about (125,000) one lac and twenty-five thousand," in place of the words and figures "(10,000) one lac," now appearing therein.

(h) That the plaintiff may have such further or other relief as the nature of the case shall require.

Upon this prayer, now that there has been all this litigation about it, it may be remarked that the plaintiff treats the falsified bought and sold notes with more ceremony than they deserve; that his first prayer ought to have made no reference to the date of these documents as the date of the contract, and that the second prayer was unnecessary. But their Lordships see no room for question that the prayers quoted afforded adequate means for rendering justice.

On 25th July 1900, Mr. Justice Sale gave Sureka a decree declaring that by virtue of the agreement between the appellant Sureka and the respondents on the 30th October 1899, Sureka was entitled to the entire quantity of cases of kerosine oil mentioned in the contract between the respondents and Messrs. Graham & Co., and giving the appellant (Sureka) damages.

On the case coming by appeal before the High Court a view of the case was taken which their Lordships consider much too narrow. The High Court treated the action as founded on the bought and sold notes; and, holding the appellant to his reference to them by date (1st November 1892), in prayer (a) and to his application, in prayer (c), that those should be rectified they pointed out that he had been refused this relief and had not appealed against the refusal, or objected to the decree under S. 561 of the Code of Civil Procedure. Accordingly the High Court

expressed their rather surprising conclusion as follows: "We think therefore that, inasmuch as under the circumstances it is not now competent to us to rectify the bought and sold notes, and since the plaintiff is precluded from proving his contract by any evidence other than the document itself, the appeal must be allowed and the suit dismissed."

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The learned Counsel for the respondents did not support this ground of judgment. The High Court was completely possessed of the case of the appellant Sureka; his case rested not on the falsified bought and sold notes, which he was there to repudiate, but on the perfectly competent evidence which, while disproving the bought and sold notes, proved the contract which they falsely purported to record. For this case no rectification was needed, and it was not touched by the 92nd section of the Evidence Act. Nor did the misconception which led to the mention of the 1st November 1899 create any substantial obstacle in the way of justice being done or necessitate so unsatisfactory a conclusion as that which has led to this appeal.

In default of any defence of the judgment of the High Court, the learned Counsel for the respondents suggested one topic which may be disposed of in a sentence. The telegrams, it was said, do not set out a complete contract, and, in particular, do not import the conditions of Graham and Co.'s contract. This argument, if it had any effect, is irreconcilable with the concurrent findings of both Courts. But the answer is that if the telegrams do not prove what is said to be wanting, the broker's evidence does.

Their Lordships will humbly advise His Majesty that the appeal ought to be allowed and the decree of the High Court reversed with costs, and the decree of Mr. Justice Sale restored. The respondents will pay the costs of the appeal.

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## IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(FROM THE MADRAS HIGH COURT).

Present :—Lord Macnaghten, Lord Lindley, Sir Andrew Scoble,  
Sir Arthur Wilson, Sir John Bonser.

S. P. R. S. Mayandi Chettiyar ... Appellant\*

v.

Chokkalingam Pillai and others. ... Respondents.

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gam Pillai.

*Regulation VII of 1817—Duty of Local Agents—Powers of Manager to lease—Effect of Regulation on such powers—Granting of permanent lease, when valid—Ulavadai Mirasdars and Purakudi, meaning of.*

Regulation VII of 1817 vested the general superintendence of all charitable endowments "in land or money" in the Board of Revenue, and made it the duty of the local agents of the Board (of whom the Collector was one *ex-officio*) to report to the Board "any instance in which they may have reason to believe that lands or buildings, or the rents or revenues derived from lands, are unduly appropriated," care being taken not to infringe private rights.

The effect of the Regulation is to supersede the powers of Managers to alienate charitable property and to sanction the revision of existing appropriations if unduly made.

The granting of a lease conferring a permanent and heritable title with fixed rents will be liable to objection on the ground that "to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time would be a breach duty" in the trustee, unless there be special circumstances of necessity to justify it.

*Maharanee Shibessouree Debia v. Mothooraitath Acharjo*<sup>1</sup> referred to.

The expression "*Ulavadai Mirasdars*" does not appear to have a well-established meaning and does not import that the person holds a permanent and heritable tenure.

The term "*purakudi*" has a well-understood and definite meaning and does not imply a right of permanent occupancy.

*Chockalingam Pillai v. Vythealinga Pandara Sannadhis*<sup>2</sup> and *Thiagaraja v. Gujana Sambanda Pandara*<sup>3</sup> approved, *Krishnasami Pillai v. Vardaraja Ayyangar* referred to.

The Judgment of their Lordships was delivered by

SIR ANDREW SCOBLE.—The suit out of which this appeal arises was brought by the Appellant as Trustee or Manager of

\* 26th February 1904.

1. 1869 13 M. I. A. 270 (275).

2. (1871) 6 M. H. C., 164.

3. (1887) I. L. R., 11 M. 77.

4. (1882) I. L. R., 5 M. 354.

the Temple of Kayarohanaswami, of Negapatam, in the District of Tanjore, in the Madras Presidency, to recover possession of certain lands in the village of Vadagudi, of which the Temple is Mirasdar, from a number of defendants, who are admittedly tenants under the Temple, but who claim a permanent tenure as cultivators, dependent only on the payment of *Ayan* and *Swamibhogam*, that is to say, of the revenue due to Government and money-rent to the proprietor. So long as these payments are made, they deny the right of the Temple to eject them; and their title is said to be derived, either directly or indirectly, from two persons named Vir dhachala and Subbaian, with whom a settlement of the lands was made by the Collector of Tanjore in the year 1833. The Subordinate Judge of Negapatam, and the District Judge of Tanjore decided the suit in favour of the appellant, but the High Court of Madras, upon appeal, reversed their decision. The question which their Lordships have to determine is the nature of the interest which Vir dhachala and Subbaian had in the lands in question; for it is not disputed that whatever interest they had has passed to the respondents. It is much to be regretted that the respondents did not appear upon this appeal, and that the case has to be decided *ex parte*.

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In the written statement of the principal respondent it is alleged that "the whole of the lands mentioned in the plaint belonged to our ancestors. Two hundred years ago they gave away the *miras* right which they had in them to the Temple of Kayarohanaswami and retained the permanent *olavadaikani* (or right of cultivation). In accordance with the said *olavadaikani* right, our ancestors and ourselves have, for the last 200 years, been enjoying the lands, cultivating them and paying the *Ayan* and *Swamibhogam* amounts to the Temple." There was no reliable evidence as to the origin of the relation between the tenants and the Temple, but in support of their allegation of the character of their tenancy three documents were produced by the respondents, to which great weight is attached in the judgment of the High Court. These documents were more than thirty years old, came from proper custody, and may be presumed to be authentic. By the first, which is dated 11th March 1813, the then Manager of the Temple gave a permanent lease of one-half of the lands in dispute to Chokkanada Pillay, the father of Vir dhachala, and the other half

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appears to have been granted on a similar tenure to one Nalla Pillay. Nalla Pillay appears to have transferred his interest, after Chokkanada's death, to Virdhachala, and by the 2nd document, which is dated 26th January 1820, Virdhachala obtained the entire land on permanent lease from the Manager of the Temple. The third document, which is dated 6th July 1822, is a sub-lease of a half-share of the property by Virdhachala to two persons named Visvanatha Mudaliar and Namasivaya Mudaliar. The first and second documents are described as *Vara Adai Olai Chits*, which is translated as "deeds letting land for cultivation and providing for share of produce," and the character of the tenure granted is described as *Ulavadaikani* or "cultivation-right land," that is to say, land which the grantee and his heirs were to have a hereditary right to cultivate. In the third the tenure is described as *Ulavadi Miras*, a phrase which is not employed in the transactions between the Temple and the grantees. There is some uncertainty as to the precise meaning of this last phrase; but the courts below concur in holding that the two grants by the Temple Manager, if still valid and subsisting, confer a permanent and heritable title.

It must be observed, however, that the second and more important of these grants bear a date subsequent to the passing of Madras Regulation VII of 1817, which vested the general superintendence of all charitable endowments "in land or money" in the Board of Revenue, and made it the duty of the local agents of the Board (of whom the Collector was one *ex officio*) to report to the Board "any instance in which they may have reason to believe that lands or buildings, or the rent or revenues derived from lands, are unduly appropriated," care being taken not to infringe private rights. These grants were thus liable to objection not only on the ground that "to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time would be a breach of duty" in the Trustee, unless there were special circumstances of necessity to justify it (*Maharanee Shibessouree Debia v. Mothooranath Acharjo*<sup>1</sup>, but also because the effect of the Regulation was to supersede the powers of Managers to alienate charitable property, and to sanction the revision of existing appropriations, if unduly made.

1. 13 M. I. A. 270 at p. 275.

There is nothing on the record to show at what date the Collector took in hand the direction of the affairs of this particular Temple, but on the 4th December 1831 a petition in the following terms was presented to him :—

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“ To N. W. KINDERSLEY, Esquire,  
*Principal Collector of the Tanjore Province.*

*Durkhast* (tender or application for land presented to the Revenue Department) written and given by the two persons Vadagudi Virdhachala Pillay and Subbaian who are *Purakudi* (*Purakulis*) of the assessed lands owned in the village of Vadagudi by Kayarohanaswami of Negapatam, Andanpettai Maganam, Kivaloor Taluq.

As we shall not only continue to pay for one year the current Fusli 41, Swamibhogam paddy 51 kalams 4 maracals to the temple paying also the Sircar assessment taking on *Durkhast* for the current Fusli 41, the wet land 20 velis, 5 mahs, 40½ gulis and dry land &c., 6 mahs, 81 gulis of the said village and cultivating and enjoying the land, but shall also furnish adequate cash security therefor (or cash security adequate thereto), we request that orders may be passed to settle (or make certain) and give for *Ekasal* (a Revenue expression meaning one year) *Durkhast Ijara* (contract or lease granted upon application to the Revenue Department) in our names accordingly.

(Signed) Virdhachallam.

( „ ) Subbaian.

(Signed) VENKATA ROW,

*Tahsildar.*”

4th December 1831.

In this Petition which, it will be observed, is in the names of two persons, Virdhachala and Subbaian, no reference is made to the antecedent grants held by Virdhachala. The Petitioners are described as *Purakudis*, that is to say, “tenants who provide themselves with seeds and ploughing cattle, and cultivate the land by personal or hired labour, receiving a share of the produce in return.” The application is for a lease for one year, and no distinction in status, is made between the two applicants. There is also some difference between the quantity of the land mentioned in Virdhachala's grants and that applied for in the petition. When it is borne in mind that one of those grants was made only

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four years before, and the other three years after, the passing of the Regulation of 1817, it does not seem improbable that the existence of these grants was not brought to the notice of the Collector, by whom their validity might have been questioned, and that the petitioners preferred to base their application on grounds less open to controversy. Be this as it may, neither in the *muchilika* of 10th January 1832, nor in the security bond of 11th January 1832 which followed the petition and completed the tender of the applicants for a lease of the lands, is there anything to indicate a claim to occupancy tenure, except that the applicants are described as *ulavadi miras* instead of as *purakudis*. On the other hand, the *muchilika* clearly contemplates a tenancy for more than one year, for it provides that "if, in any year," garden crops are raised by means of irrigation, a higher money-rent is to be paid. In like manner it is stipulated that if "in any *fusli*, damage is caused by flood or drought," allowance is to be "made for damage, according to custom and discretion." And the applicants further agree that "as *kayam taram thirwa* (permanent classification money-assessment, has been fixed from the current *fusli* 1241 . . . we shall pay the Sircar the *thirwa* (money-assessment) of each *number-wari* land." In explanation of the phrasaology used, it is stated that classification-settlement is a settlement of assessment made with reference to the quality of each field (or number) as opposed to the settlement of a village in gross; and that such a settlement was at that time in progress in the Tanjore district.

No *pottah* appears to have been granted in exchange for the *muchilika*, but the order passed by the Collector is shown in the following extract from an official diary containing copies of orders sent to the Tahsildar of Kivalur, the district in which the property is situated :—

"Received your Arzi, dated 18th January last, stating that, as the two persons *Virdhachala Pillay* and *Subbaian* who had given *Durkhast* (presented a petition or tender) for the previous *one Sal* (one year, termed also *Ekasal*) as per order for the assessed wet, dry &c., land owned by *Kayarohana Swami* of *Negapatam*, said taluq, in the village of *Vadagudi*, had agreed to *Taram Faisal* (classification settlement) permanently at the rate of 51 *kalams* of paddy per annum (on account of) *Swamibhogam* to the temple paying the

Sircar kist due for the said land, you had obtained *muchilika*, &c., from him (them) and forwarded the same and soliciting orders for putting him (them) in possession of the land.

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“Referring to that matter, you shall put the *Ijaradar* (tenderer) in possession of the said land and collect duly as per instalments what is *due to the Sircar* as well as the Swamibhogam.

CAMP VALLAM,  
14th February 1883.” }

(Initialled) M. K.

This being the state of the title of the defendants, as shown by the documentary evidence in the case, the following issue was raised in the Court of the Subordinate Judge :—

“ Whether under the terms of the *muchilika* of the 10th January 1832, Virdhachala Pillai and Subbaian were tenants from year to year or acquired a right of occupancy ?” And the Subordinate Judge found that “ looking at the *muchilika* by itself it does not evidence more than a contract of letting from *fusli* to *fusli* at the yearly rent specified ;” and he further held that from the petition it was plain that Virdhachala “ owing to his inability to cultivate the land, or from some other reason, must have given up his right of perpetual lease granted to him under ” the grant of 26th January 1850. The District Judge of Tanjore came to the same conclusion. He says : “ In some way or other it is perfectly clear, as the Subordinate Judge points out, that on the 4th December 1831 ” (the date of the petition to the Collector) Virdhachala “ had either given up or had lost all his right to perpetual lease granted to him ’, by the Temple authorities ; and he held that “ all he and his successors in title have to depend upon is the fresh contract that was made ” (with the Collector) “ in 1882,” under which no permanent right of occupancy was conferred.

The learned Judges of the High Court took a different view. They held that the tenancy began, not under the *muchilika*, but under the grant from the Temple authorities in 1813 ; that there was no sufficient evidence to prove that the tenancy under the grant of 1823 and 1220 was ever determined, and that the transaction evidenced by the *muchilika* was not a new lease, but a confirmation of the previous grant, with a modification as to the mode of paying the rent. In support of these conclusions, they attach

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much importance to the description of the applicants, in the *muckilika* and security bond, as *ularadui mirasidars*; and they hold that this description differentiates the present case from cases in which the High Court had, under similar circumstances, decided otherwise. They accordingly reversed the decrees of the Courts below, and dismissed the plaintiff's suit with costs throughout.

Upon a careful consideration of the whole of the evidence in the case, their Lordships are unable to adopt the conclusions arrived at by the learned Judges of the High Court. It seems to them incredible that if the previous grants had been brought to the knowledge of the Collector in 1831-33, there should not have been some reference to those grants in the proceedings taken before him. Not only is there no such reference, but the applicants come before him in the same character as *purakudis*, and description as *ularadui mirasidars* does not occur in any document emanating from the Collector's office, but only in documents put forward by the applicants themselves. The words, moreover, do not appear to have a well-established meaning. The Judges of the High Court translate them as "persons with an hereditary right to "cultivate;" but the Subordinate Judge says that, although the meaning of the words taken separately is clear enough, "the meaning of both the words put together is not explained," nor does the combination find a place in Wilson's Glossary. It would be extremely unsatisfactory to rest the decision in a case of this importance on a vernacular expression of doubtful signification.

On the other hand, their Lordships find that the term *purakudis* which is employed by the applicants in their petition to the Collector, has a well-understood and definite meaning, and the character of the tenure created by the proceedings before the Collector in analogous cases has been determined by judicial decisions. In the case of *Chockalinga Pillai v. Vytheulinga Pandara Sunnady*<sup>1</sup>, in which the circumstances were very similar to those of the present appeal, and there was a *muckitika* in similar terms, it was held that no permanent tenancy was created. "The language of the agreement," said *Scotland*, C. J., (p. 168) "had, I think, no greater effect than the ordinary form of *muckilika* given

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1. 6 M. H. C. R. 164.

by raiyat in exchange for a *pottah*, except so far as it indicated the intention that its terms should apply to every successive fusli for which the holding might be continued by neither party exercising the right to terminate it at the end of a fusli." This decision was followed by the Madras High Court in the case of *Thiagaraja v. Giyana Sambandha Pandara*<sup>1</sup>, in which the circumstances were almost identical; and their Lordships see no reason to differ from the conclusions at which those learned Judges arrived, upon a state of facts which cannot be distinguished, in any material degree, from those in the present suit. In a third case, *Krishnasami Pillai v. Varadaraja Ayyangar*<sup>2</sup>, in which there was no *muchilika* and the decision turned on length of occupation, it was held that the term *purakudi ulavada*, by which the tenant's predecessor in title was described in his petition to the Collector, did not necessarily imply a right of occupancy; but, in other respects, the decision does not affect the question now before their Lordships which, in their opinion, must be decided upon the contract sanctioned by the Collector in 1833.

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Chettiyar  
v.  
Chokkalin-  
gam Pillai.

Their Lordships will humbly advise H's Majesty that this appeal ought to be allowed, and the decree of the High Court reversed with costs, and the decrees of the District Court of Tanjore restored. The respondents will pay the costs of the appeal.

#### IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr Justice Bhashyam Aiyangar and Mr. Justice Moore.

Moidin Kutti... ... *Defendant\* in Mis. Case No. 472 on  
the file of the Special Assistant  
1st Class Magistrate of Malabar.*

v.

Abdulla ... ... *The lessee of the old Pattiripala  
Market.*

*Criminal Procedure Code, S.133—Old market existing—New market opened by another—* Moidin Kutti  
*Carrying on trade not injurious to health or physical comfort—Order closing new* v.  
*market illegal.* Abdulla.

A person who opens a new market close to an old one cannot, by the mere fact of opening such market, be said to be carrying on a trade or occupation that is injurious to the health or physical comfort of the community: and a Magistrate is

\* CrI. Pn. Case No. 148 of 1902.

26th August 1902.

(Case Referred No. 37 of 1902.)

1. I. L. R., 11 M. 77.

2. I. L. R., 5 M. 345.



Moidin Kutti not justified in passing an order under S.133 of the Criminal Procedure Code closing the new market.  
 v.  
 Abdulla.

Even the fact that people in the old market are forcibly dragged from it to the new one will not justify the order under S. 133.

Case referred for the orders of the High Court under S. 438 of the Criminal Procedure Code; by the District Magistrate of Malabar in his letter, dated 10th March 1902, Ref. in Cur. <sup>593</sup>/<sub>M</sub>.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the order of the Special Assistant Magistrate of Malabar passed on M. C. No. 4 of 1902.

*C. V. Anantakrishna Aiyar* for *P. R. Sundara Aiyar* for the lessee of the market.

*V. Ryru Nambiar*—for 1st defendant.

The Court made the following

ORDER:—It appears that there is a market in Pathipala village and that one Moidin Kutti set up a rival market close to it. The Head Assistant Magistrate issued a notice to Moidin Kutti under S. 133 of the Criminal Procedure Code to show why cause, why he should not be ordered to discontinue holding the new market, and having heard the rival market holder passed an order under S. 136, Code of Criminal Procedure, closing the new market. The District Magistrate having referred the matter to us as a Court of Revision, we have no hesitation in setting aside the order.

It is utterly impossible to hold that because there is already one market in a village a man who opens another market close to it can be held to be carrying on a trade or occupation that is injurious to the health or physical comfort of the community. It is not even alleged that the new market causes any injury to any one's health or comfort. All that is said here in support of this order is that people in one market are sometimes forcibly dragged from it to the rival institution. If so, the offenders can be prosecuted criminally but the fact that such assaults etc., have been committed is no ground for passing an order under S. 133 of the Code of Criminal Procedure. The order of the Head Assistant Magistrate is set aside.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Davies and Mr. Justice Benson.

Govinda Pillai, minor by his next friend Muthu- Appellant\*  
 sami Pillai ... .. (Plaintiff).

v.

Thayammal and others ... .. Respondents  
 (Defendants).

*Hindu Law—Reversioners' suits—No privity between reversioners—Remote reversioners when entitled to sue—Limitation Act, S. 7 and Arts. 120, 125—Suit to set aside alienation—Specific Relief Act, S.42—Discretion—Parties—Statute—Construction.* Govinda Pillai v. Thayammal.

A suit by a person who is not the presumptive reversioner at the time for setting aside an alienation made by the widow is governed by Art. 120 and not by Art. 125.

*Bhagwanta v. Sukhi*<sup>1</sup> followed; *Chhaganram Astikram v. Bai Moti Gavri*<sup>2</sup> dissented from; and *Ayyadorai Pillai v. Solai Ammal*<sup>3</sup> distinguished.

There is no privity of estate between one reversioner and another as such and, therefore, an act or omission by one reversioner cannot bind another who does not claim through him.

Where there are several reversioners entitled successively to succeed to an estate held for life by a Hindu widow, no one of such reversioners can be held to claim through, or to derive his title from, another reversioner even if that other happens to be his father, but each derives his title from the last full owner and the right of each to sue for a declaration cannot accrue before he is born.

A reversioner who is a minor at the date of the alienation or who is born subsequently during the life of the widow is entitled to the benefit of S. 7 of the Limitation Act.

*Bhagwanta v. Sukhi*<sup>4</sup> followed.

Remote reversioners have a right of suit where all the reversioners of the superior grade have either colluded with the widow or have otherwise precluded themselves from bringing a suit or are barred by the Law of Limitation from bringing such a suit. In such a case upon a plaint stating the circumstances under which the more distant reversioner claims to sue, the court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue and would probably require the nearer reversioner to be made a party to the suit.

*Rani Anund Koer v. The Court of Wards*<sup>5</sup> and *Gurulingaswami v. Ramalakshamma*<sup>6</sup> followed.

\* S. A. No. 411 of 1902.

2nd March 1904.

1. I. L. R., 22 A. 33.

3. I. L. R., 24 M. 406.

5. L. R., 8 I. A. 14.

2. I. L. R., 14 B. 512.

4. I. L. R., 22 A. 33.

6. I. L. R., 18 M. 53.

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*Semle* :—A Court of First Instance ought in the exercise of the discretion vested in it by Specific Relief Act S. 42 refuse to give a declaration in favor of plaintiff who has a very remote chance of succession. *Tekait Doorga Persad v. Tekaitni Doorga Konwari* referred to.

But where two courts have given a declaratory decree in favour of a remote reversioner the High Court will not interfere though it is of opinion that as a first court it would not have granted the relief.

It would be wrong on principle to hold that the words of a section in an Act must be limited to the illustrations given in the Act, or by reference to suits specially enumerated in the Limitation Act.

Per DAVIES, J. :—A decree granting a declaration in favour of a remoter reversioner will serve the purpose of perpetuating testimony for whomsoever may happen to be the reversioner on the death of the widow.

Second appeal from the decree of the District Court of South Arcot in A. S. No. 179 of 1901 presented against the decree of the Court of the District Munsif of Chidambaram in O. S. No. 863 of 1900.

*C. Ramachandra Row Sabib* for appellant.

*V. Krishnaswami Aiyar* for respondent.

The Court delivered the following

JUDGMENTS :—BENSON, J.—The plaintiff, who is a minor, sued, as reversioner, for a declaration that an alienation of the plaint property by the 1st defendant, who is a Hindu widow, is invalid as against him after the death of the widow. The District Munsif gave the declaration asked for, but the District Judge dismissed the suit on the ground that it was barred by limitation as the plaintiffs' father did not bring any suit (though it was open to him to do so) and any such suit by the father would now be barred by time, and a suit by the son must *a fortiori* be also barred.

The District Judge refers to *Ayyadorai Pillai v. Solai Ammal*<sup>1</sup> as an authority for his view. But that case refers to an adoption which introduces an heir into a family and effects a change of status, and is thus very different from a mere transfer of property, and attention was specially drawn to this distinction by the learned Judges who decided *Ayyadorai Pillai v. Solai Ammal*<sup>2</sup>. The District Judge seems also to have had in view the case of *Chhagan-*

1. L. R., 5 I. A. 149 (153).

2. I. L. R., 24 M. 405.

*ram Astikram v. Bai Motigauri*<sup>1</sup> which is referred to by the District Munsif and which is directly in support of the view taken by the District Judge. The correctness of that decision, however, may well be doubted for the reasons stated by the Full Bench of the Allahabad High Court in the case of *Bhagwanta v. Sukhi*<sup>2</sup>. It was there pointed out by a Full Bench of six Judges that where, as in this case, the plaintiff would not be entitled to immediate possession if the female having a life estate should die on the date of the institution of the suit, the article of the Limitation Act applicable is not No. 125, but No. 120, which allows a suit to be brought within six years from the date when the right to sue accrued. It was also pointed out that when there are several reversioners, as in this case, entitled successively to succeed to an estate held for life by a Hindu widow, no one of such reversioners can be held to claim through or to derive his title from another reversioner, even if that other happens to be his father, but each derives his title from the last full owner; that the right of each to sue for a declaration cannot accrue before he is born, and that a person, who is a minor at the date of the alienation or who is born subsequently during the life of the widow, is entitled to the benefit of S. 7 of the Limitation Act.

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We think that that decision is correct. There is no privity of estate between one reversioner and another as such, and therefore, an act or omission by one reversioner cannot bind another reversioner who does not claim through him.

The reasons, therefore, given by the District Judge for dismissing the plaintiffs' suit are, we think untenable.

It is, however, contended for the respondents that the decree of the District Judge ought to be sustained for other reasons, viz., (1) because the plaintiff, as a remote reversioner, has no right to sue while a nearer reversioner is alive and (2) because the suit is one in which the court, in the exercise of its discretionary power, under S. 42 of the Specific Relief Act, ought to refuse to make a declaratory decree in the plaintiff's favour even if he has the right to sue.

1. I. L. R., 14 B. 512.

2. I. L. R., 23 A. 33.

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The widow's husband died in 1870. The alienation was first made by a mortgage in 1871. This mortgage, it is found by the courts below, was supported by necessity only to the extent of Rs. 75. It was followed by another mortgage in 1875 in discharge of the former mortgage and this by a court-sale in 1884 in execution of a decree obtained on the mortgage. The plaintiff was born in 1883, some 12 years after the first mortgage. He is a remote reversioner of the third grade. There are reversioners (2nd and 3rd defendants) of the 2nd grade and apparently reversioners of the 1st grade also alive.

None of these have questioned the alienation and their right to do so by a declaratory suit is now in each case barred by limitation. The plaintiff, as a remote reversioner, cannot succeed to the property so long as nearer reversioner is alive, and it is contended for the respondents that the plaintiff has no right to bring a suit for a declaration, as he is not the presumptive or immediate reversioner. The right to bring a declaratory suit is given by S. 42 of the Specific Relief Act, 1877 and though illustration (E) of that section and Art. 125 of the Limitation Act refer only to suits by a person presumptively entitled to possession, it would be wrong, on principle, to hold that the words of a section in an Act must be limited to the illustrations given in the Act, or by reference to the suits specially enumerated in the Limitation Act. The principle which should guide the court is laid down by the Privy Council in the case of *Rani Anund Koer v. The Court of Wards*<sup>1</sup> as follows:—“ Their Lordships are of opinion that although a suit of this nature may be brought by a contingent reversionary heir, that is to say, by the person who would succeed if the widow were to die at that moment, they are also of opinion that such a suit may be brought by a more distant reversioner if those nearer in succession are in collusion with the widow, or have precluded themselves from interfering. They consider that the rule laid down in *Bhikaji Apagi v. Jagannath Vithal*<sup>2</sup> is correct. It cannot be the law that any one who may have a possibility of succeeding on the death of the widow can maintain a suit of the present nature, for, if so, the right to sue would belong to every

1. L. R., 8 I. A., 14, at p. 22.

2. 10 Bom. H. C. R. 351.

one in the line of succession however remote. The right to sue must, in their Lordships' opinion, be limited. If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct, from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue: see *Koer Golab Singh v. Row Kurun Singh*<sup>1</sup>. In such a case, upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue and would probably require the nearer reversioner to be made a party to the suit."

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—  
Benson, J.

That is the rule laid down by the Privy Council with regard to an adoption, but the same rule was laid down by this court in suits like the present for a declaration in regard to an improper alienation: *Gurulingaswami v. Ramalakshamma*<sup>2</sup>.

In the present case the nearest reversioner concurred in the improper alienation; and all those nearer than the plaintiff had omitted to sue and are now barred from doing so by limitation. They are all made parties to the suit. We think that in these circumstances all the nearer reversioners must be held to have precluded themselves from suing and that the plaintiff is therefore entitled to maintain the suit. Whether the court ought, in the first instance, in the exercise of its discretion, to have allowed the suit to proceed seeing that there is only a small probability of the plaintiff becoming a presumptive heir, may well be doubted on the ground that the defendants ought not to be harassed and the time of the courts wasted in litigation that may never have any practical result, *Tekait Doorga Persad Singh v. Tekaitni Doorga Konwari*<sup>3</sup>. But as the matter now stands before us the suit has been tried in three courts, and it has been found that the alienation by the widow was without necessity and was improper except to the comparatively small extent of Rs. 75. It may be that when the widow dies the plaintiff will be the presumptive reversioner, and in that case a decree in the present suit would save him from having to again prove

1. 14 M. I. A., 193.

3. L. R. 5 I. A., 149 at 163.

2. I. L. R., 18 M. 53 at 57.

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the impropriety of the alienation, whereas if we now dismiss his suit on the ground that the District Munsif ought to have exercised his discretion and refused to hear it, the whole matter will have to be again litigated. As matters stand, our giving the plaintiff a decree on the facts proved cannot, in any event, do any harm, but may, in the event of the plaintiff being the presumptive heir when the widow dies save further litigation. For these reasons we set aside the decree of the District Judge and give the plaintiff a declaration that the alienation is not valid as against him beyond the lifetime of the widow save to the extent of Rs. 75 for which defendants Nos. 5 and 6 have a charge on the property.

The plaintiff must pay and receive proportionate costs throughout.

DAVIES, J:—I would simply add that by allowing the declaration in this particular case to stand it will (1) serve the purpose of perpetuating testimony for whomsoever may happen to be the next reversioner on the death of the widow, and (2) so to prevent the time of our courts from having been utterly wasted which otherwise would be the case.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Moore.

Pappi Anterjanam, the present	} Appellant* ( <i>Plaintiff</i> .)
Karnavathi of the Illom	
v.	

Teyyan Nayer and others ... Respondents (*Defendants*).

Pappi Anterjanam v. Teyyan Nayer. *Nambudri Brahmins of Malabar—Junior members of an illom—Right to marry—Custom—Onus.*

The junior members of a Nambudri Illom in Malabar are not prohibited by law or custom from contracting valid marriages in their own community.

The onus of proving that such members cannot validly marry lies on the person who avers it.

Second appeal from the decree of the Subordinate Judge's Court of South Malabar at Palghat in A. S. No. 888 of 1899 pre

sented against the decree of the Court of the District Munsif of Pappi Anterjanam  
Nedunganad in O. S. No. 6 of 1899.

*P. R. Sundara Aiyar* for appellant.

*v.*  
*Teyyan Nayar.*

*V. Krishnaswami Aiyar* and *A. Nilakanta Aiyar* for respondents.

The Court delivered the following

**JUDGMENT:**—The first issue raises a question of considerable importance. It runs “Whether junior members of Nambudri Illoms are prohibited by law or custom from contracting valid marriages in their own community.” The District Munsif has decided this question in the negative but the Subordinate Judge has taken the opposite view and held that such marriages are prohibited. He bases his decision mainly on two judgments one of Mr. Wigram, who was for some years District Judge of South Malabar and the other of Mr. Raman Nayar, a Subordinate Judge employed in Malabar. Mr. Wigram’s judgment is dated the 14th December 1876 and was delivered in S. A. No. 562 of 1876. In it he observes that “it is difficult to see how the 2nd defendant who is the wife of Narayanan Nambudri’s younger brother who predeceased him can have any status social or otherwise in a Nambudri family where only the oldest male member may marry.” This no doubt reads as if Mr. Wigram was prepared to hold that the marriage of a junior male in a Nambudri Illom was illegal. At the time that this judgment was pronounced, Mr. Wigram, however, had been only a year in Malabar and when some six years later he published his “Malabar Law and Custom” he expressed himself, as we believe, more accurately as follows:—“In order to maintain the rule of impartibility among the Brahmins it is customary for the oldest only of several brothers to marry whilst the younger brothers are permitted to form temporary alliances with Sudra women” (Wigram’s Malabar Law and Custom, 1st Edition, page 3). This is, we believe, the correct view to take of this question. There is no law prohibiting these marriages; but a custom has sprung up under which the junior males do not as a rule marry. Mr. Raman Nayar’s judgment was passed in 1874 (O. S. No. 35 of 1873). The plaintiffs in that suit contended that a junior male in a Nambudri family could not contract a valid marriage and



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based their case on S. 383 of Mr. Justice T. L. Strange's Manual of Hindu Law. The defendants produced no evidence on the point and the Subordinate Judge accordingly decided in favour of the plaintiffs. It does not appear to us that much importance can be attached to the decision. The Subordinate Judge quotes Mr. Justice Strange as laying down that "the law which governs the Nambudri families does not under any circumstances permit a junior Nambudri to contract a valid marriage." This is a much more positive statement than is to be found in Mr. Justice Strange's Manual. All that he really says is that the origin of Marumak-kathayam is "conceived to have been thus—" "It is alleged that Parasuramer, the first king of Malabar introduced Brahmans into the District and gave them possessions therein and to prevent these properties from being split up decreed that they should vest in the elder brothers whom alone he permitted to contract marriage. The sons of these were to be accounted as sons for the whole family. The junior brothers being without wives were allowed to consort with females of lower castes." (Strange's Manual of Hindu Law, 2nd Edition pages 94-95). All that this really amounts to is that Mr. Justice Strange points out that in Malabar there is a custom by which the junior males in a Nambudri Illom do not marry and then proceeds to give the mythological explanation of the custom. That Mr. Justice Strange attached the slightest weight to this myth which, it may be remarked, is absolutely without historical foundation, there are no grounds for supposing.

It is thus evident that the judgment of Subordinate Judge of Palghat now under consideration is based on very scanty material. The Subordinate Judge observes that he has not been referred to a single decision of the High Court wherein the marriage of an Anandravan in a Nambudri family has been held to be valid, and when the argument was advanced that evidence had been produced before the District Munsif of several cases in which junior male members of Illom had contracted marriages, met the argument as follows:—"I am of opinion that the law should be administered as it is and not according to any practice amongst Nambudris which must have been of recent origin. Be that as it may, there is no legislative or judicial sanction for the marriage of a younger brother

in a Nambudri family." The Subordinate Judge has here, in our opinion, improperly imposed on the plaintiff the onus of proving that the marriage of a junior in an Illom is legal. Brahmins are to be found all over India and everywhere they are in the habit of contracting valid marriages with females of their own caste. Even in Malabar it has never been questioned that the senior males at all events in an Illom can marry. Such being the case, the onus of proving that certain members of certain Brahmin families cannot enter into a legal marriage contract is clearly on the person who advances such a proposition, opposed as it is to the law and custom prevailing among members of the caste all over India. The defendants have certainly not discharged this onus. All that they have shown is that in order to maintain the rule of impartibility prevailing among Nambudris a custom has sprung up under which junior males do not usually marry but the evidence proves that that custom is not invariably followed and we are decidedly of opinion that we should not be justified in holding that such an ancient, continued and uniform custom of junior males in an Illom not marrying has been shown to exist as could be held to deprive them of the right which, as members of the Brahmin caste, they would ordinarily have of contracting a valid marriage with one of their own caste.

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Nayer.

We accordingly hold on the first issue that junior members of Nambudri Illoms are not prohibited by law or custom from contracting valid marriages in their own community. It must be held that the plaintiff cannot sue to recover the properties mentioned in the plaint on the strength of the demise of 1870 (Exhibit E) as it is shown that that demise has been superseded by a valid demise granted in 1890 (Exhibit XX) on behalf of and under the authority of Pappi Antarjanam, widow of Narayanan Nambudri, who was then the Karnavati of the Illom. On this ground this second appeal must be dismissed with costs.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmaniya Aiyar, *Offg. Chief Justice*  
and Mr. Justice Boddam.

Subbarow and others	...	...	...	Appellants*
				(Defendants).
v.				
Venkata Narasimhan	...	...	...	Respondent
				(Plaintiff).

Subbarow v. Venkata Narasimhan. *Evidence Act, S. 92, proviso 4—Usufructuary mortgage—Discharge by mortgagee of performances—Oral agreement between mortgagee and some representatives of mortgagor—Proof—Rescission of contract.*

An oral agreement by which an usufructuary mortgagee stipulated for the discharge of a portion of the mortgaged properties by receiving a proportionate part of the mortgage debt from one of the representatives of the mortgagor can be proved provided such agreement is between the mortgagee and one of the representatives (but not all) of the mortgagor and Evidence Act, S. 92, Proviso 4, concluding part, has no application to such a case.

Per Boddam, J. :—The exception at the end of proviso 4 to S. 92 of the Evidence Act applies to executory as well as executed agreements.

No contract can be rescinded or modified except by the consent of all the parties to it or their representatives.

Some of the parties to a written contract may agree orally, that some one or more of the parties thereto may be discharged from it and the proviso to S. 92 with the exception does not apply to such a case and there is no other provision of law preventing proof of such an oral agreement from being given.

Second appeal from the decree of the District Court of Vizagapatam in A. S. No. 78 of 1901 confirming the decree of the Court of the District Munsif of Vizagapatam in O. S. No. 387 of 1900.

*P. S. Sivaswami Aiyar* and *V. Ramesam* for appellants.

*T. Vencatasubba Aiyar* and *Narayana Sastri* for respondent.

The Court delivered the following

**JUDGMENT :—***Offg. Chief Justice* :—A usufructuary mortgage, dated the 16th May 1898, was executed in favour of one Subbarayudu who took possession of the mortgaged lands and subsequently died. The plaintiff, who is Subbarayudu's adopted

\* S A. No. 189 of 1902.

6th October 1903.

son, sues in the present suit for the recovery of the lands in dispute which were part of the property comprised in the mortgages alleging that during his minority the first defendant took wrongful possession of the property. The principal defence was that the mortgagor having died, the equity of redemption became vested in the first defendant and another, the daughter's sons and heirs of the mortgagor and that the first defendant, who is entitled to a moiety of his grand-father's estate, entered into an oral agreement with the adoptive mother and guardian of the plaintiff for a redemption of his share only, and in pursuance of such agreement paid her Rs. 600, being a moiety of the mortgage amount and redeemed the lands in question, as falling to his share.

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—  
Offg. Chief  
Justice.

The District Munsif as well as the District Judge decreed possession to the plaintiff holding that the agreement set up could not be proved, apparently on the ground that it was oral, while in their opinion, it should have been by writing registered.

The latter supposition is obviously wrong and the only point for determination in this case is whether the defendant is precluded from proving the alleged agreement by the concluding part of the fourth provision to S. 92 of the Indian Evidence Act. I think he is not. No doubt, if the agreement in question were an agreement between the parties to the mortgage or their representatives in interest within the meaning of the first paragraph of S. 92, it could not be proved, the original transfer having been by a registered instrument while the subsequent agreement was oral. That, however, is not the case here. Of course one party to the alleged agreement was the plaintiff who is the representative of the mortgagee, but of the two representatives of the mortgagor, only one was party, acting merely with reference to his own interest in the property. Doubtless it being open to the plaintiff to split the mortgage, the agreement, if true, had the result of bringing about a change in the rights of the plaintiff and the rights of the mortgagor's representatives (inclusive of the one not party to the agreement) as they originally stood under the mortgage, inasmuch as the plaintiff's rights would be confined to the lands retained by him while the rights of the representative of the mortgagor not party to the agreement was merely to recover his share of the mortgaged land on payment of the proportionate share of the debt, with a right to contribution or other

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remedy as against the first defendant, in case the circumstances entitled him to such. It is not agreements of this sort, however, that come within the provision under consideration. Only those agreements come within the section, which affect the terms of the previous transaction—not indirectly, as here, as a consequence of an independent and valid contract between some only of the parties, but directly by virtue of the consensus of those who alone are competent to rescind or modify the original contract, viz., all the parties concerned or all their representatives.

The lower Courts were therefore in error in disallowing proof of the agreement. I would set aside their decrees and remand the case for disposal according to law. Costs will abide and follow the result.

BODDAM, J.:—I agree. It is not necessary for me to restate the facts of this case as they have already been stated in the judgment of the learned acting Chief Justice.

At the hearing of this appeal, the only argument raised before us was that, as the agreement sought to be proved was an executed agreement, the exception at the end of proviso 4 to S. 92 of the Evidence Act did not apply; that it only applied to executory agreements and not to executed agreements. The words of the proviso are perfectly clear and in my opinion apply to any agreement whether executory or executed. The rule is stated in the first part of the proviso. The rule is that “The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property may be proved.” This applies equally to any agreement whether executed or executory. Then comes the exception “except in cases in which such contract “grant or disposition of property is by law required to be in writing or has been registered according to the law in force for the “time being as to the registration of document.” This being an exception to the rule stated in the earlier part of the proviso applies also in the same way to any agreement whether executed or executory. The intention of the legislature being as it seems to me to make an exception from the general rule that a subsequent oral agreement to rescind or modify any contract may be proved when the original contract is of such a nature as that the

law requires it to be in writing or where its execution has been followed by the formality of registration. In such cases the only way of proving the rescission or modification of the original contract must be proof of an agreement of the like formality and not by an oral agreement and this whether the agreement has been executed or is executory.

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There is, however, another aspect of the case which has not been argued before us though the facts alleged on the part of the defendant clearly raise it ; and as the suit has not been heard but has been determined upon the preliminary question, whether the defence raised by the defendant can be proved, it is right that we should deal with it.

The real question is whether the defendant is precluded by any provisions of law from proving the alleged oral agreement made between himself and the plaintiff's adoptive mother and guardian whilst the plaintiff was a minor. If the agreement between the defendant and the plaintiff's adoptive mother and guardian rescinds or modifies the original contract of mortgage, it cannot be proved because it is oral and the original contract of mortgage is registered. If, however, it does not rescind or modify it, it can be proved as there is no provision of law to prevent it. No contract can be rescinded or modified except by the consent of all the parties to it or their representatives, i.e., all their representatives and the section and the 4th proviso to it only applies "as between the parties to any such instrument or their representatives in interest" that is, necessarily all their representatives. It is only the parties to a contract (or all their representatives) who can "contradict, vary, add to, or subtract from, its terms" or who can "rescind or modify such contract" and it is only when the contract is to be rescinded or modified, that the proviso (and the exception to the proviso) applies. Here the defendant does not contend that the original contract is rescinded or modified by the subsequent oral agreement which he alleges was made between himself alone and the plaintiffs' adoptive mother and guardian, for he does not pretend that it was made between all the representatives of the original parties to the contract but only between the representative of the mortgagee and himself and he is only one of the representatives of the mortgagor, and cannot act for and

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bind the other representatives of the mortgagor. The original contract remains and is not rescinded or modified; but he says that by an oral agreement made between himself alone and the plaintiff's adoptive mother and guardian (that is the plaintiff's representative) a new and separate agreement has been made between them whereby it has been agreed that he should be permitted to redeem half the mortgaged property by paying off half the mortgage money and receiving back possession of half the lands mortgaged. What he alleges is that as between himself and the plaintiff he is discharged from the contract so far as that is possible.

It is clear that without rescinding or modifying a contract some of the parties to the contract may agree that some one or more of the parties to the contract may be discharged from it and S. 44 of the Contract Act provides for such a case and safeguards the rights of the other parties to the original contract. This section provides that where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors" that is because the original contract remains and is not rescinded or modified by such a release.

Now unless there is some provision of law which prevents proof of an oral agreement to discharge one promisor from the contract there is no reason that the defence set up should not be proved. The 92nd section of the Evidence Act does not apply to such a case. It only applies where the original contract is contradicted, varied, added to or subtracted from, and the proviso only applies where the original contract is rescinded or modified and does not apply where a subsequent contract is made independent of the original contract that one party shall be discharged from it so far as that can be done as between the parties to the subsequent contract and I know of no provision of law which prevents such a subsequent contract being proved even though it be an oral contract only.

In these circumstances, as the plaintiff's suit is for trespass and to recover possession of the land which the defendant alleged has

been redeemed under the oral contract which he sets up, I agree that the decrees of the lower Courts are wrong and should be set aside and the suit should be remanded to the Munsif's Court for hearing and disposal according to law.

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The costs throughout should abide and follow the result.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir S. Subrahmania Aiyar, *Offg. Chief Justice*.

Zemindar of Ettiapuram . . . . . Petitioner\*  
(Plaintiff).

v.

Subba Reddy and others . . . . . Respondents  
(Defendants).

*Civil Procedure Code, S. 37—"Reside", meaning of—Power of Attorney given by Zemindar during absence for Delhi Durbar—Zemindar non-resident—Suit filed by agent, propriety of Vakil's authority.*

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"Reside" is an ambiguous and elastic expression and has to be interpreted with reference to the object and character of the provision in which it occurs.

The object or purpose of S. 37, C. P. C., being to provide for appearances being made and acts being done on behalf of suitors in courts within the jurisdiction of which they are not, at the time, present, a liberal construction should be placed upon the term "non-resident" occurring in the said section.

Where, therefore, the plaintiff, the Zemindar of Ettiapuram, left Ettiapuram, his permanent residence, for Delhi to attend the Durbar, and before leaving, gave a power of attorney to a certain person to institute and conduct suits in his absence, and the agent instituted a suit against the defendants for rent due, but omitted to file with the plaint the power of attorney which he was bound to do under Rule 23 of the High Court Rules, and the District Munsif returned the plaint for the power of attorney being filed in accordance with the said rule and the plaint was re-presented with the power of attorney, but after the Zemindar had returned from the Durbar, (the Zemindar being absent in all for about two months):—

*Held* (1) that the Zemindar must be treated as "non-resident" within the meaning of S. 37, C. P. C.;

- (2) that the plaint must be treated as properly presented by the agent within the meaning of that section;
- (3) that the production of the power of attorney though after the Zemindar's return would not affect the presentation of the plaint when he was away; and
- (4) that the vakil who had been retained when the plaint was presented was perfectly competent to file the power when he did it.

\* C. R. P. No. 385 of 1903.

28th March 1904.



**Zemindar of**            Petition under S. 25 of Act IX of 1887 praying the High Court  
**Ettiapuram**        to revise the decree of the Court of the District Munsif of Satur  
**v.**                    in Small Cause Suit No. 233 of 1903.  
**Subba Reddy.**

*P. B. Sundara Aiyar* for petitioner.

*V. Krishnaswami Aiyar* and *S. Srinivasa Aiyar* for respondents.

The Court delivered the following

**JUDGMENT:**—The petitioner in this case is the Zemindar of Ettiapuram. He left Ettiapuram, where he resides permanently and which is within the jurisdiction of the District Munsif of Satur, in the beginning of December 1902 to attend the Durbar in Delhi and returned to his station towards the end of January 1903. Before he left Ettiapuram the petitioner gave a general power of attorney to one Ettiahpandian authorising him, among other things, to institute suits on his behalf during his absence. On the 9th January 1903 Ettiahpandian acting under the power of attorney, presented a plaint for rent due to the petitioner. Under Rule 23 of the Civil Rules of Practice the power of attorney should have been filed in court. But that was not done and the court returned the plaint with the order endorsed thereon, "Rule 23 should be complied with—returned, time one month." On the 13th February 1903 the plaint was re-presented accompanied by the power of attorney. The District Munsif thereupon rejected the plaint on the 20th April.

The question is whether the plaint was a proper plaint in that it was signed and verified only by the party who held the general power of attorney, and this depends upon whether the petitioner was a party "non-resident" within the meaning of S. 37 of the Civil Procedure Code. My attention was drawn to a number of cases in which the terms 'reside,' 'residence,' 'dwell,' 'dwelling' have been construed with reference to the various legislative provisions in which those terms occur. I do not consider it necessary to refer to them in detail.

One general result of the authorities is that 'reside' is an ambiguous and elastic expression and that it has to be interpreted with reference to the object and character of the provision in which it

occurs. Now the purpose of S. 37 of the Civil Procedure Code is to provide for appearances being made and acts being done on behalf of suitors in courts within the jurisdiction of which they are not, at the time, present. Having regard to this, I agree with the learned judges who decided *Ramachandra Saktharam v. Keshav Durgagi by his agent Hakma Depaji*<sup>1</sup>, which deals with the interpretation of the above section that a liberal construction should be put upon the term 'non-resident' in the section, and I also hold that the present case is in a measure analogous to that in regard to its circumstances as well, though there the absence of the party from his permanent place of residence was about four months while here the absence was shorter. The occasion which led to the petitioner leaving his place was an official ceremony which the petitioner, as a landholder, was, as it were, bound to attend. The station he was going to was many hundred miles away from his native place and the affairs of his estate naturally required during his absence supervision by some one entitled to represent the petitioner. In these circumstances the petitioner's absence could not be treated as so short and temporary as to warrant his being looked upon as still resident within the jurisdiction of the court in regard to the application of the section; and therefore the plaint as presented was in my view a proper plaint. No doubt when Rule 23 of the Civil Rules of Practice was complied with by the production of the power of attorney, the petitioner had returned to Ettiapuram but that could not affect a plaint which had been presented when he was away. The filing of the power of attorney on the date on which it was filed by the vakil who had been retained when the plaint was presented was an act perfectly within the power of the vakil.

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I therefore set aside the order of the District Munsif and direct that the plaint be restored to the file and proceeded with according to law.

I make no order as to costs.

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1. I. L. R., 6 B. 100.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Bhashyam Aiyangar.

Ramaswami Gounden ... .. Prisoner.\*

v.

King Emperor.

Ramaswami Gounden. *Murder—Accomplice evidence—Person merely concealing dead body—No accomplice—Necessity of corroboration.*

King Emperor.

Held by Sir S. Subramania Aiyar, Offg. C. J. and Sir V. Bhashyam Aiyangar J. (Boddam J., dissenting):—A person who has helped the accused to conceal the corpse of a person murdered or has omitted to give information of the murder is not an accomplice although he may be guilty of an offence either under S. 201 or S. 202 of the Indian Penal Code.

Per Sir S. Subrahmania Aiyar, Offg. C. J. :—

The rule that an accomplice must be corroborated in a material particular is a mere rule of general and usual practice, the application of which is for the discretion of the Judge by whom the case is tried.

The rule has no application in the case of an accomplice who is merely a youthful tool in the hands of one who stood to him in *loco parentis*.

An accomplice is a person who is a guilty associate in crime or who sustains such a relation to the criminal act that he can be jointly indicted with the defendant (principal).

Per V. Bhashyam Aiyangar, J. :—

The conviction of an accused on the uncorroborated testimony of an accomplice is perfectly legal and a direction to the jury that it will be their duty to convict the accused if they believed the accomplice and gave credit to his evidence is a perfectly legal direction.

A direction to the jury that the evidence of an accomplice is not sufficient to find the accused guilty will be a misdirection.

Per Boddam J. :—An accomplice is unworthy of credit unless he is corroborated in material particulars.

Where there is no such corroboration, it will be the duty of a Judge to direct the jury that there is no sufficient evidence before them upon which they will be justified in finding an accused guilty.

A Judge who combines the functions of Judge and Jury is equally bound to scrutinise accomplice evidence with great care and to consider whether there is any corroborating evidence when the main evidence is of an accomplice character.

Appeal by the prisoner against the sentence of death.

*Eardley Norton* and *P. Narasimhachari* for the accused.

*The Public Prosecutor* for the crown.

The Court (*The Officiating Chief Justice and Boddam, J.*) delivered the following.

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**JUDGMENTS\* :—OFFICIATING CHIEF JUSTICE.**—The accused Ramasawmi Gounden has been convicted by the Sessions Judge of Coimbatore of the murder of one Angayi and sentenced to death. The case for the prosecution briefly is, that after the deceased Angayi had been deserted by her husband some years ago, she used to work as a servant under the accused; that during that time the accused, who was a widower, kept her: that he having since married again broke off the connection with the deceased; that the latter had been in the habit of dunning the accused for money for expenses, which she sometimes got; that on or about the 8th June last she again applied for pecuniary help to the accused, who was then in his field; that on his refusing to comply with her request she would not leave the place but lay down there threatening to disgrace him publicly before his relatives who had come for the festival then about to take place in the adjacent village of Malayampundi; that later on that night the accused struck the deceased who still persisted in staying in the field with a crow-bar on the head, killed her and threw her body into a grain-pit 10 or 12 feet deep some distance off in a field of one of his cousins and covered up the place.

The case thus set up practically rests on the evidence of Velappa Gounden, a boy of about 16 or 18 who was, at the time of the murder, living with, and under the protection of, the accused and working for him, the accused holding in his hands what little money belonged to the witness. Velappa speaks to the intimacy which had previously existed between the deceased and the accused, to her demanding money from the accused on the occasion in question, to the accused's refusal, to the threat by the woman as aforesaid, to the infliction of the fatal blow by the accused and to the concealment of the body in the pit where it was found upon his giving information some days later. Though the witness did

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\* 17th November 1903.

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not admit that he assisted the accused in removing the body from the place of murder to the pit and covering it up, yet the Sessions Judge was of opinion that the witness was most likely to have done so. Having regard to the circumstances in which the witness was working under the accused, it is not probable that he would have ventured to disobey if, as is likely, the accused, assuming him to be the murderer, had required him to help in concealing the body. In dealing with this case it is perhaps better to proceed as if Velappa had assisted the accused in the way supposed, though I cannot say, I believe he did so assist.

Proceeding on some such assumption, the learned counsel for the appellant contended that Velappa being an accomplice and his evidence being uncorroborated in respect of anything tending to connect the accused with the murder, the trial court would, if the case had been tried before a jury, have been bound to direct the jury to acquit the accused, and consequently this Court ought to acquit him; and he more than once invited us to lay down the law on the point, as if the question had not long since passed the stage of controversy and as if the rules on the point required fresh enunciation. But the whole subject of accomplice testimony has been over and over considered and expatiated upon. As shown in the leading Indian case of *Eluhee Buksh*<sup>1</sup> in which *Sir Barnes Peacock* went into the whole matter exhaustively, the Indian law on the subject has been borrowed from the English law and it is not necessary now more than to refer to *Reg. v. Boyes*,<sup>2</sup> as containing, so far as I am aware, the practically final statement of the law in England in no uncertain terms.

The third count in the charge, of which alone Boyes was convicted, was that he gave a bribe to Pougher, a voter at an election. He was tried by a jury before *Martin, B.* Pougher was called as to this count and his evidence was to the effect that, on the morning of the election, he went to a place where the defendant was, saw the defendant and was desired to go into a room and on doing so heard a voice say 'two' which was followed by two sovereigns being put into his hands. In the course of the summing up, the learned Judge said (p. 34 in Cox's report):—"Assume

1. 5 W. R. Cr. 80.

2. 9 Cox. C. C. p. 32 S. C. 1 B & S. 311.

for the purpose of the present discussion that this man was speaking the truth. Is there any law which prohibits a jury from believing a man who (it must be assumed for the sake of the argument) spoke the truth, simply because he is not corroborated? I know of none. I know of no rule of law myself, but there is a rule of practice which has become so hallowed as to be deserving of respect."

After some more observations to the effect that it was doubtful whether the evidence of other witnesses examined in the case, viz., the remaining voters who said they had received in similar circumstances the other sums mentioned in the several counts of the indictment, furnished such corroboration as was contemplated by the rule, the case was left with the jury who returned a verdict of guilty. On a motion for a new trial one of the grounds taken was the absence of corroboration of Pougher's testimony, and counsel for the defendant contended that, as the witness was uncorroborated, the Judge ought to have directed the jury not to act upon it. But *Cockburn*, C. J., observed (p. 35, Cox's report):—"If he (*Martin*, B.) told them the practice was generally not to act on the evidence of an accomplice without being confirmed, but if the evidence made out to their minds that he was speaking the truth, they ought to believe him, I think his direction was right. I protest against its being the duty of the Judge to direct the jury to acquit because the evidence of an accomplice is uncorroborated."

*Wightman*, J., added:—"The law does not of necessity require any corroboration."

In the course of the same argument the Chief Justice after referring to certain passages in Taylor On Evidence bearing on the point as a fair exposition of the practice, added:—"We think he ought not to have told the jury to acquit if the witness was uncorroborated". However a rule *nisi* was granted on this ground also, but it was subsequently discharged, the Court (*Wightman*, *Crompton*, *Hill* and *Blackburn*, JJ., according to the report in *Best & Smith*, and *Cockburn*, C. J., *Crompton*, *Hill* and *Blackburn*, JJ., according to that in Cox), in substance holding that the rule that the evidence of an accomplice requires corroboration, is not a rule of law but a rule of general and usual practice, the application of which is for the discretion of the Judge by whom the case is tried.

The substance of the law as laid down by the decided cases has been embodied in the Indian Evidence Act, though as

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Mr. Mayne observes "Singularly enough it is necessary to collect it from different parts of the Act." They are section 193, illustration (b) to S. 114, and the explanation to that illustration. Neither the language of the said illustration (b) nor its position in the Act is perhaps best calculated to put the matter in an altogether unmistakeable light; for the term "presumption" is used in English law so as to include a great variety of incongruous matters as will be seen from the following quotation which, despite its length, I venture to make, from the instructive chapter on 'Presumptions' in Thayer's Preliminary Treatise on Evidence at the common law. The author concludes the chapter by observing:—"It may be remarked that the numberless propositions figuring in our cases under the name of presumptions are quite too heterogeneous and non-comparable in kind, and quite too loosely conceived of and expressed to be used or reasoned about without much circumspection. Many of them are grossly ambiguous, true in one sense and false in any other; some are not really presumptions at all, but only wearing the name; some express merely a natural probability and others, for the sake of having a definite line, establish a mere policy. Very many of them like the rule about children born in wedlock, lay down a *prima facie* rule of the substantive law and others a rule of general reasoning and of procedure founded on convenience or probability or good sense; like the wide-reaching principle which; 'presumes a usual and ordinary state of things rather than a peculiar and exceptional condition...legality than crime, and virtue and morality rather than the opposite qualities; which demands a construction of evidence as well as of written language *ut res magis valeat quam pereat*.' Some are maxims, others mere inferences of reason, others rules of pleading. others are variously applied; as the presumption of innocence figures now as a great doctrine of criminal procedure and now as an ordinary principle in legal reasoning or a mere inference from common experience or a rule of the law of evidence. Among things so incongruous as these and so beset with ambiguity there is abundant opportunity for him to stumble and fall who does not pick up his way and walk with caution."

It may be noted that the explanation to illus. (b) of 114 refers to the *presumption* that an accomplice is unworthy of credit unless

he is corroborated in material particulars, as a *maxim* and affords, so far as it goes, a striking illustration of the justice of Professor Thayer's remarks and it is evident that some of the misconceptions which attend the question of accomplice testimony are due to the phraseology adopted in treating of it. If, however, it be remembered, that what is laid down as to the untrustworthiness of uncorroborated accomplice-testimony is not a presumption in the strictly legitimate sense of the term in the law of evidence—in other words—is not a rule of law which throws upon the party against whom it works the duty of going forward with the evidence (Thayer's Preliminary Treatise on Evidence, p. 339) but is a precept of caution, hallowed indeed by constant practice in charging juries and never to be lost sight of in estimating the weight due to such tainted evidence, there is little chance of one going astray in the application of what Judges have always significantly distinguished from a rule of law characterising it as a mere matter of practice. To claim for it greater potency, in the face of S. 133 of the Indian Evidence Act, would be to introduce an artificial scale of credit; and “nothing can be more absurd” to borrow from the language of *Lord Denman* in *King v. Harborne*<sup>1</sup> than that there should be any rigid presumptions as to matters of fact where the only question ought to be what evidence is admissible and what inferences may fairly be drawn from it.”

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With these remarks on the general question raised by the learned counsel I proceed to consider whether the suggestion that Velappan was an accomplice is well-founded. The term “accomplice” signifies a guilty associate in crime (see *United States v. Neverson*<sup>2</sup>) or as it is put in another case “where the witness sustains such a relation to the criminal act that he could be jointly indicted with the defendant, he is an accomplice” *White v. Commonwealth*<sup>3</sup> Now there can be no hesitation in concluding that Velappa had no manner of concern in the perpetration of the murder itself. His own evidence does not lend the least colour in favour of the view that he had anything to do with the killing of the deceased. Nor is there otherwise any evidence tending to such a supposition, though, as already observed, it is not improbable that, after the

1. Ad. & Gl. p. 540.

2. Century Digest Vol. XIV Col. 1779.

3. Ibid. Col. 1780.



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murder was committed, the witness assisted in the removal of the dead body from the place of murder to the pit in which it was buried. But this being all the complicity that can be attributed to him it seems to me that that could not make his evidence against the accused that of accomplice; for though the witness might be indictable under S. 201 of the Penal Code for the concealment of the body, while the accused himself could not be, (see *Noor Buz Kasi and others v. The Empress*,<sup>1</sup> and *Queen Empress v. Lalli*,<sup>2</sup>) yet such offence on the witness's part being one perfectly independent of the murder, the witness could not rightly be held to be either a guilty associate with the accused in the crime of murder or liable to be indicted with him jointly.

Thus in a prosecution for adultery it appeared that the defendant and O procured two rooms opening into each other and were visited by two women; and that the defendant and one of the women occupied one of the rooms most of the night and O and the other woman occupied the other room. It was held that O was not an accomplice of the defendant in that though he might have been guilty of a crime himself, he did not assist defendant in the crime of adultery. *State v. Evan*<sup>3</sup>.

Reference may also be made to Baron Martin's observations in *Reg v. Boyes* already cited which go to show that the different voters who were bribed in one and the same place and on one and the same occasion, were not accomplices of each other. The learned Judge said (p. 34, Cox C. C.):—"This case is distinguishable from that cited by the counsel for the defendant for they were there accessories properly so-called and all the persons were concerned in the same offence in which they came to give evidence against the man. In this particular case it is not so because a'l of these are separately gone into and it is not one and the same offence".

The Judges, however, who discharged the rule, without directly deciding the point, were all of opinion that even if, in a sense, the voters were accomplices of Pougher, their evidence must be held to furnish sufficient corroboration.

1. I. L. R., 6 C. 279.

2. I. L. R., 7 A. 749.

3. Century Digest, Vol. XIV, Col. 1780.

Be this as it may, there is no doubt that the authorities draw a clear distinction which is referred to and illustrated in the explanation to the illustration (1) of S. 114 of the Indian Evidence Act and which is well pointed out in the following observation of Hill, J.: "In the application of the rule much depends on the nature of the crime and the extent of the complicity of the witness in it. If the crime is a very deep one and the witness so far involved in it as to render him apparently unworthy of credit he ought to be corroborated. On the other hand if the offence be a light one as in *Rex v. Hargrave*<sup>1</sup> where the nature of the offence and the extent of the complicity could not much shake his credit, it is otherwise"<sup>2</sup>. In *Rex v. Hargrave*<sup>1</sup> referred to here, *Patteson*, J., ruled that notwithstanding that persons present at, and sanctioning, a prize fight where one of the combatants is killed are guilty of manslaughter as principals in the second degree, yet they are not such accomplices as to require their evidence to be confirmed if they are called as witnesses against other parties charged with the manslaughter.

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Take for instance cases of bribery on the part of public officials not infrequently occurring in this country. Suppose one, where the witness himself has tempted the public servant with the bribe for some unrighteous end of his own and another, where the facts are as in Criminal Appeals Nos. 26, 28, and 33 of 1903 where a Police Inspector was held to have extorted money by a threat of falsely implicating the witnesses in a charge of murder and handcuffing and imprisoning them unless they paid money. It is scarcely necessary to say that it would not be good sense to treat the two cases alike. The proper application of the rule would be to require corroboration in the one and to dispense with it in the other. This was clearly implied in the judgment of this Court in the said criminal appeals when it was observed "they are more involuntary than voluntary accomplices and in that light their evidence is not tainted as much as it would otherwise be".

In this connection it only remains to observe that Velappan's delay in reporting the perpetration of the murder which he says he saw committed, to which some reference was made in the

1. 5 C. & P. 170.

2. 1 B & S. 322.

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argument, is quite immaterial and would be so even had he altogether failed to give information and thus brought himself under S. 202 of the Penal Code. It would be clear from reasons already stated that that would not make him an accomplice.

It follows, therefore, that the rule of practice as to corroboration has no application to the case first, because Velappa was not an accomplice within the meaning of the rule, and secondly, because even if he were, his complicity as a youthful tool in the hands of one who stood to him in *loco parentis* is not such as to make it necessary to require corroboration.

The question then resolves itself into one of the credibility of Velappa's evidence, to be decided, no doubt, as in the case of any other witness with reference to the circumstances of the case. Viewing the testimony in this light I agree with the Sessions Judge for much the same reasons as those given by him, in holding that his evidence is substantially true and may be acted upon. The strongest point that can be made against the witness is that the disclosure of the crime was not made purely in the interests of public justice, and but for the quarrel between the accused and the witness shortly before the witness gave information to the police, he would not have moved in the matter at all. Considering that the witness is but a lad, that he had long been under the protection of the accused, that the whole of the money which was all his property was held by the accused, it was not unnatural, however culpable it may have been, that the witness did not report the crime of his master and guardian until, as he says, he was goaded on to it by the prisoner's subsequent ill-treatment of the witness.

The delay in such circumstances does not to my mind argue that the evidence is false.

I would, therefore, confirm the conviction. As to the sentence, however, having regard to the fact that the murder was committed in consequence of the deceased attempting to blackmail the accused, and of her having threatened to disgrace him in the presence of people who were about to assemble on the occasion of the festival at the place, I would commute the sentence to one of transportation for life.

*Boddam, J.*—The accused was convicted of murder and sentenced to death subject to the confirmation of that sentence by the High Court. He has appealed against the conviction and the appeal and the referred trial have been heard at the same time. The case against the accused depends entirely upon the evidence of the 1st witness, a young man of 18, who says he was present when the accused murdered the deceased (a cooly woman named Angayi) on Monday, the 8th June, and saw him dispose of the body by throwing it into a cholam-pit, where it was found some 16 days later upon information given by him 15 days after the murder.

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The story told by this witness is that he had been working for the accused for 2½ years before the murder, that the deceased also worked for the accused as sweeper, and that the accused married in *Peratasi* and as the deceased had become *enceinte* by him, he, in October preceding the murder, had sent her away to Kariyampatti, a village in the Dindigul Taluq, whence she was brought back in 4 or 5 days by her brother after presumably having procured abortion, as he says she came back much thinner. That the accused again sent her away giving her money to Appayanpatti, but when she had spent that money she returned and used to come frequently to the accused's garden asking for money and would remain and not leave unless money was given to her. That on Monday in *Vyasi* at noon she came to the accused's garden and asked the accused for money and threatened to complain to the Pattagar and his relations and disgrace him if he did not pay her. She then went to lie down between two ricks. In the evening the accused asked the witness for the crow-bar and he gave it to him. He and the accused then went to meals. At night the accused and others made a collection for a festival next day. After the people went to bed the accused came to witness who was at the pen feeding the dogs. He then went to where the woman was lying down leaving the witness feeding the dogs. The witness heard a cry of *Ayyo!* and thinking the accused was beating the woman he went and hid in the cholam and saw the accused strike the deceased on the head with a crow-bar, and being afraid he ran back to the pen. The accused called him and he went to him and the accused then asked the witness to help him to put the dead body into the cholam-pit about 70 yards from where the corpse was, which was then empty

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and open. The witness says he refused and the accused dragged her alone by the legs to the cholam pit and threw her in. After that the witness went and slept at the pen and the accused after closing the cholam pit went to his house. About cock-crow next morning the accused came to where the witness was lying and threatened that if he disclosed the matter to any one he would not pay him Rs. 40 due to him and would deal with him as with Angayi. Ten days later the witness sold a goat for Rs. 4-12-0 and asked the accused for Rs. 5 to buy a cow, when the accused refused and threatened to take the Rs. 4-12-0 from him saying he was not in need of any cow-calf. Afterwards the accused finding the witness had not gone to the pen, beat him and threatened to throw him into the cholam-pit. After this, next morning the witness ran away, met the brother of the deceased woman, told him what had happened to Angayi, and on his way home the witness met the Station House Officer in a bandy and told him and took him and some villagers to the cholam-pit. When the stone over the cholam-pit was lifted, there was a bad smell and the Station House Officer left a guard. This was on the 23rd June. Next day, in the evening, the Sub-Magistrate, Hospital Assistant and others arrived, and the body was taken out of the pit and identified. The witness says he did not tell before because he was afraid.

The only evidence given in addition to that of this witness is that of the deceased's brother and sister, a goldsmith whose evidence the Sessions Judge entirely disbelieves, the man in whose house she lived at Kariyampatti, the police and the Village Munsif and the *post-mortem* certificate.

The only evidence given by the brother is that he heard the deceased was in the accused's keeping and that he brought her back from Kariyampatti to the accused's house. When he brought her back, she appeared to be pregnant and that she must have had a miscarriage after she came back to the accused—in this respect contradicting the 1st witness.

The sister says, 'I was told by people generally and by deceased that she was living with accused for 2 or 3 years'.

The 5th witness merely proves that the deceased came to Kariyampatti and stayed 8 or 4 days.

The Station House Officer proves that he received information from the 1st witness at noon on the 23rd when he met him accidentally as he was driving in a bandy about 1½ miles from the accused's house—and the Village Munsif proves that on the 23rd June the Station House Officer sent a Toti to him.

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The *post-mortem* certificate shews that death was due to fracture of the skull, there being a fracture 2 inches long through which it was easy to pass a probe into the brain. Death must have occurred at least 2 weeks before.

From the above, it will be seen that the only corroboration of any part of the story of the 1st witness is that the brother and sister *had heard* that the deceased had been in the accused's keeping; that the body was found in the cholam pit and that death was caused by fracture of the skull which might have been caused by a blow from a crowbar.

The cholam pit in which the body was found was common to the accused and his brothers and was not actually on the accused's land though adjacent to it.

On behalf of the accused it is urged that to all intents and purposes, though possibly not in strict law, the first witness is an accomplice—and the Sessions Judge has held that he was an accomplice—and that therefore unless his evidence be corroborated by independent testimony proving not only that the deceased came by her death in the manner described, but also directly connecting the accused with the murder—the accused ought not to be convicted; and secondly, that even if the accused is not an accomplice and the necessity for such corroboration is not in practice obligatory, on evidence such as has been given in this case, no jury would be justified in finding the accused guilty. So far as the connection of the accused with the crime is concerned there is no evidence at all except that of the 1st witness who has admittedly a cause of quarrel with the accused and who has never said anything about the crime or the accused's connection with it until he had reason to wish to injure the accused, and therefore his evidence is so tainted with suspicion that it should not be relied upon to convict any one of so serious a crime.

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The law in England with regard to the necessity for corroborating the evidence of an accomplice is that corroboration of accomplices is not necessary in strict law (*R. v. Attwood*<sup>1</sup>); but it is the general practice to require corroboration, and for the prosecution (in order to induce the jury to credit his testimony) to give other evidence confirmatory of at least some of the leading circumstances of his story from which the jury may be able to presume that he has told the truth as to the rest, and for the Judge to tell the jury not to act upon the uncorroborated testimony of an accomplice, *R. v. Rudd*<sup>2</sup>. It has been said that if an accomplice be confirmed as to the particulars of the story, he does not require confirmation as to the persons charged, but this doctrine has been rejected in later cases inasmuch as the confirmation as to the circumstances proves only that the accomplice was participant in the felony, not that the particular party charged was his confederate, *R. v. Webb*<sup>3</sup>, *R. v. Wilkins*<sup>4</sup>, *R. v. Birkett*<sup>5</sup>, *R. v. Stubbs*<sup>6</sup>, and where upon an indictment against principals and accessories, the case against the principal was proved by an accomplice who was confirmed as to the accessories but not as to the principal the jury were directed to acquit the prisoners, *R. v. Wells*<sup>7</sup>, *R. v. Moores*<sup>8</sup>.

The law is practically the same in this country. In *Queen Empress v. Maganlal and Motilal*<sup>9</sup>, a Full Bench case, the law is stated as follows:—"By the law both of India and England the "evidence of an accomplice is admissible and a conviction is not "illegal because it proceeds upon the uncorroborated testimony of an accomplice (S. 133, Indian Evidence Act)." But the presumption allowed by illustration (b) of S. 144 of the Evidence Act that an accomplice is unworthy of credit unless he is corroborated in material particulars has become a rule of practice of almost universal application. Judges now in their charges usually tell a jury that under ordinary circumstances it is unsafe to convict on such evidence without the substantial corroboration of independent evidence. A judge who combines the functions of Judge and jury is equally

1. 2 Leach, 464.

2. 1 Cowp. 331—336, (*R. v. Memier* (1894)  
2 Q. B. 415).

3. 6 C. & p. 595.

4. 7 C. & p. 272.

5. R. & R. 732.

6. Dears 555.

7. M. & M. 326.

8. 7 C. & p. 270.

9. I. L. R., 14 Bom. 115.

bound to scrutinise accomplice evidence with great care and to consider whether there is any corroborating evidence when the main evidence is of an accomplice character.

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Assuming for the moment in this case that the first witness is, as the Session Judge considers, an accomplice, there is, as I have said before, absolutely no evidence to corroborate his story except that the body was found in the cholam pit and that the brother and sister were informed that the accused had kept the deceased. How does that corroborate the accused's story? The woman is murdered, there is no question as to that; the question is how, when and by whom. It is assumed that she was murdered by a blow with a crowbar as her skull was fractured, but what corroboration is there of the first witness's story that a crowbar was in fact the instrument used or that it was used by the accused? It is quite as possible that the 1st witness was the murderer as the accused, and he has a very good reason for attributing the murder to the accused against whom he has a grievance. Would it in these circumstances be right, in the absence of any independent evidence, to connect the accused with the crime, to find him guilty and hang him merely because the 1st witness says so. There is clearly no independent evidence to connect the accused with the crime. The fact that he had at one time kept the deceased does not suggest a motive—and even if it did, a motive alone is not sufficient to constitute corroborative evidence of the facts. If therefore the 1st witness is in law an accomplice, I am clearly of opinion that it would be the duty of the Judge to direct the jury that there was not sufficient evidence before them upon which they would be justified in finding the accused guilty.

Now is the 1st witness an accomplice or should his evidence be treated as the evidence of an accomplice?

According to his own account he was cognizant of the crime and concealed it for 15 days and did not divulge it until he had a cause of quarrel with the accused, and then he accuses him of it not by going straight to the police but first when he accidentally met the brother of the deceased and then to the police when he accidentally met the Station House Officer. He was in any case an accomplice in concealing the body, and his evidence is to that



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extent at all events the evidence of an accomplice. In *Ishan Chandra Chandra and two others v. Queen Empress*<sup>1</sup>, the case against the accused rested mainly on the testimony of an informer who admitted that, after becoming cognizant of the crime, he kept quiet about it for 6 days and it was urged on behalf of the accused that even if not an accomplice his evidence ought not to be acted upon except to the extent to which it was corroborated by independent testimony. In dealing with this question in their judgment at p. 336 the Judges say :—"we agree with the learned Sessions Judge that it would be unsafe in this case to act upon the unsupported evidence of Gooroo Pershad. We are not prepared to say he is an accomplice. He may have been one, but it is impossible to say in this case that he helped in the commission of the offence. He was undoubtedly cognizant of it and omitted to disclose it for 6 days. From any point of view we do not think that his testimony is such as to justify a conviction except where he is corroborated."

These observations exactly apply to the evidence of the 1st witness in this case—and in *Alimuddin v. Queen Empress*<sup>2</sup>, the Judges say, "We cannot but regard the evidence of these two witnesses as no better than that of accomplices. At any rate they took such a part in this transaction as to make it most unsafe for the Court to rely upon their evidence unless corroborated in some material respect in convicting the accused."

In my opinion even if the 1st witness was not an accomplice, having regard to the fact that he was cognizant of the crime for 15 days without disclosing it and that he had a cause of quarrel with the accused at the time when he did disclose it, it would be most unsafe to act upon his evidence unless it was corroborated in some material particular connecting the accused with the crime, and as there is no such evidence, I think the accused ought to be acquitted.

Even apart from the necessity for corroboration, I do not think that in this case the accused ought to be convicted upon the evidence given. I do not think any one could say with confidence

1. I. L. R., 21 C. 328.

2. I. L. R., 23 C. 361.

that the guilt of the accused is brought home to him or that there is not a reasonable doubt as to his guilt.

I think no one could rely upon the evidence of the 1st witness even though it did not require corroboration.

I would allow the appeal, and set aside the conviction and sentence and acquit the accused.

[Owing to this difference of opinion the case was argued before Mr. Justice *Bhashyam Aiyangar*.]

His Lordship delivered the following

**JUDGMENT** :—This case in which the accused has been sentenced to death on a charge of murder has been referred to me under S. 378 and 429, Criminal Procedure Code, in consequence of a difference of opinion between the *Officiating Chief Justice* and *Boddam, J.* The Sessions Judge treated the principal witness in the case, viz., the 1st prosecution witness as an ‘accomplice’ who is unworthy of credit unless he is corroborated in material particulars and in summing up the case to the assessors stated that it would be unsafe to convict the accused upon the evidence of such a person unless in respect of material particulars he was corroborated by independent reliable evidence. Differing from the assessors, he convicted the accused of murder as in his opinion the accomplice was corroborated in material particulars by independent reliable evidence notwithstanding that he did not rely upon the evidence of the 4th witness for the prosecution whose evidence alone if believed, would corroborate the accomplice in a material particular which would go towards implicating the accused in the murder of the deceased.

I agree with *Boddam, J.*, that the particulars referred to by the Sessions Judge in respect of which the evidence of prosecution witness No. 1 is corroborated by other reliable evidence only go to show that the deceased was murdered at or about the time and place mentioned by the 1st witness and that she had been for some time in the service of the accused and probably in his keeping but that none of these particulars implicates the accused in the murder. In *Rez v. Webb*<sup>1</sup> an accomplice was called to prove the case against the prisoners and he stated that when the robbery was

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committed, the thieves took a ladder from the premises of Mr. Player. To confirm the accomplice Mr. Player's servant was called to prove that Mr. Player's ladder was taken away on the night on which the felony was committed and counsel for the prosecution also proposed to call other witness to confirm the accomplice as to the mode in which the felony was committed. *Williams, J.*, addressing the counsel for the prosecution stated as follows:—  
“You must show something that goes to bring the matter home to prisoners. Proving by other witnesses that the robbery was committed in the way described by the accomplice is not such confirmation of him as will entitle his evidence to credit so as to affect other persons. Indeed, I think, it is really no confirmation at all as every one will give credit to a man who avows himself a principal felon for at least knowing how the felony was committed. It has always been my opinion that confirmation of this kind is of no use whatsoever.”

In *Rex v. Mcorer*<sup>2</sup> before *Alderson, B.*, and *Williams, J.*, it was held that if A is charged as a principal and B as a receiver, an accomplice when called to give evidence against B ought to be confirmed as to some matter affecting B and a confirmation as to the guilt of A does not advance the case against B; and in *Rex v. Wilkes*<sup>3</sup> *Alderson B.* in summing up, stated that there was a great difference between confirmations as to the circumstances of the felony and those which applied to the individuals charged, the former only proving that the accomplice was present at the commission of the offence, the latter showing that the prisoner was connected with it and that this distinction ought always to be attended to. In *R. v. Wells*<sup>4</sup> on an indictment against principal and accessories, the case against the principal was proved by the testimony of an accomplice who was confirmed as to the accessories but not as to the principal. *Littledale, J.*, held that there being no confirmation against the principal felon the case failed altogether. In a learned note by the Reporter this ruling is criticised but the criticism is really a criticism of the longstanding and ‘hallowed’ rule of practice of advising the jury not to convict on the testimony of an accomplice unless he is corroborated in material particulars.

If the 1st witness for the prosecution was really an accomplice and the trial was before a jury I should, in drawing the attention

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2. 7 C. & P. 270. 3. (*Ibid.* 2709. 4. 1 M. & M. 326.

of the jury to this practice, explain that there was no corroboration of the accomplice in a material particular implicating the accused in the murder unless they believed the evidence of the 4th witness for the prosecution, but I should add that even if they did not believe prosecution witness No. 4, the conviction of the accused on the uncorroborated testimony of the accomplice is perfectly legal and that it would be their duty so to convict him if they believed the accomplice and gave credit to his evidence. I am, however, unable to agree with *Boddam, J.*, that if the 1st witness was in law an accomplice "it would be the duty of the Judge to direct the jury that there was not sufficient evidence before them upon which they would be justified in finding the accused guilty." and with all respect I should say that this would be a misdirection. In *Rex v. Boyes*<sup>1</sup>, *Cockburn, C. J.*, adverting to counsel's argument that *Martin B.* ought to have directed the jury not to act upon the uncorroborated testimony of an accomplice, protested against it being the duty of the Judge to direct the jury to acquit because the evidence of an accomplice is uncorroborated and added that the Judge ought not to have told the jury to acquit if the witness was uncorroborated. It may be that except under very special circumstances the settled course of practice is not to convict a prisoner upon the sole and uncorroborated testimony of an accomplice and if, in the opinion of the Judge, there are no special circumstances, which would induce him to give credit to the evidence of the accomplice and convict the prisoner on his sole uncorroborated testimony he may no doubt, under sub-section 2 of S. 298 of the Code of Criminal Procedure, express such opinion to Jury and in that sense advise them to acquit the prisoner. Under sub-sections (2) and (3) of S. 289 of the Code of Criminal Procedure it is clear that it is only in cases in which the Court considers that there is no evidence, on behalf of the prosecution that the accused committed the offence, that the Jury can be directed to return a verdict of 'not guilty.'

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The Sessions Judge's view that the 1st prosecution witness is an accomplice, is however clearly untenable and the learned counsel for the appellant while conceding that the witness is not an 'accomplice' in the strict sense of the term, contends on

1. 9 Cox C. C. 32 at p. 35.

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the authority *Ishan Chandra v. Queen Empress*<sup>1</sup> and *Alimuddin v. Queen Empress*<sup>2</sup> that the 1st witness is a quasi-accomplice and no better than an accomplice and that it would be unsafe to convict the accused upon his uncorroborated testimony. The 1st witness who is a servant of the accused was in no way privy to the murder of the deceased. His evidence is that after the accused had murdered the deceased he came to the pen to which the witness had returned after seeing the accused to strike the deceased a blow with the crow-bar, and called upon him to come and help him to put the deceased's body into the cholam-pit, that he refused to do so, though he accompanied the accused to the spot, that the accused alone dragged the body by the legs the one hundred yards to the cholam-pit and that after putting it in replaced the stone over the opening and covered it over with earth, after which the accused went home and the witness to the pen. The Sessions Judge considers it unlikely that the witness ventured to disobey the accused and says that he has 'little doubt that the witness helped to put the body in the cholam-pit, though he now very naturally disclaims having done so as he is afraid to admit having had any hand in the disposal of the corpse himself.' This is by no means improbable, and assuming that the witness did assist the accused to hide the body with the intention of screening him, his master, from punishment, he would be guilty of an offence under S. 201 of the Indian Penal Code. But whether this be so or not, he is guilty of an offence under S. 202, Indian Penal Code, as he was legally bound, under S. 44 of the Criminal Procedure Code, *forthwith* to give information to the nearest Magistrate or Police Officer, of the commission of the murder of which he was aware and the fact that he gave such information about a fortnight afterwards—when he had quarrelled with the accused will not altogether exculpate him. It is unnecessary to repeat the reason given by the Officiating Chief Justice, in which I fully concur, for holding that the witness cannot be regarded as an 'accomplice' in the crime for which the accused is now under trial and with all deference I am constrained to dissent from the view taken by the learned judges of the Calcutta High Court in the cases above noted, that the evidence of a witness who, like the 1st prosecution witness in the present case, has helped the accused to

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1. I. L. R., 21 C. 328.

2. I. L. R., 23 C. 361.

conceal the corpse of the person murdered or has omitted to give information of the murder of which he was aware, should be regarded and tested as that of an accomplice and not acted upon unless corroborated in material particulars. In regard to the testimony of accomplices or *participes criminis*, there is no doubt the maxim that an accomplice is unworthy of credit unless he is corroborated in material particulars and this rests not on any rule of law but only 'on a rule of practice which has become so hallowed as to be deserving of respect.' But there is no authority whatever in English Law which warrants the extension of this maxim to persons who are not accomplices, as in the Calcutta cases (referred to); and I do not think it will be in furtherance of justice to regard another class of witnesses as *quasi*-accomplices and to extend the maxim to them. It is very doubtful whether even the practice which has become 'hallowed' by time "is not one of the instances in which the law of the country has been subtilised for the protection of individuals (including notably corrupt officials) and not for the furtherance of justice." The rule of law that a conviction upon the uncorroborated testimony of an accomplice is not illegal (*vide* S. 133 of the Evidence Act) is practically rendered nugatory by this rule of practice with the further result that there is strong temptation to suborn evidence to corroborate the accomplice on a material particular and when such corroborative evidence is forthcoming it acquires undue importance, and this as well as the evidence of the accomplice are both easily credited.

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The appellant's counsel next urges that the evidence of the 1st witness is in itself untrustworthy and that the conviction ought to be quashed; and I now proceed to consider the evidence in the case without being hampered by any artificial rule or test for appreciating the evidence. The 1st witness is a lad of between 16 and 18 years of age and had been in the service of the accused for about two and a half years. The deceased Angayi was the wife of a resident of the same village as the accused, but had been deserted by her husband who had disappeared from the village. She was afterwards doing cooly work and was for nearly two years in the accused's service, living in his house and cooking for him, the accused's first wife having deserted him and subsequently died. 1st prosecution witness says that Angayi was in the accused's keeping and that after he had married again in September or October

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1902, he sent away Angayi, who was then pregnant, to Kariyampatti, giving her some money, that 5 or 6 days afterwards she came back to the accused with her younger brother (2nd prosecution witness), that she was then given some more money and sent to another village, Appayanpatti, that subsequently she used to come frequently to the garden of the accused and ask him for money and would remain in the field and not leave it until she was given some money, and that on the 8th June 1903—the day preceding the festival of the Mariamman temple in a neighbouring village—she came to the garden, dunned the accused for money, threatening that she would complain to the Pattagar and his relations and disgrace him if he did not pay her and persisted in staying in the garden. After referring to the engagements of the day &c., the witness then states that the accused went in the night to where the deceased was lying (in the field) and that when he (the witness) was giving food to the dogs at the pen he heard a cry of ‘Aiyoh’ and thinking the accused was beating the deceased he went and looked and then saw the accused strike the deceased on the head with a crow-bar. After referring to the throwing of the corpse into the cholam-pit, the witness says that he was warned by the accused next morning not to disclose the matter to any one and that if he did so he would not pay him (the witness) the money (belonging to the witness) which the accused had in his hands and that he would deal with him as with the deceased, that about 12 days afterwards there was some quarrel between the witness and the accused about the witness buying a cow out of the money due to him from the accused and about the sale-proceeds of two goats sold by the witness, that he therefore did not go as usual to the pen but remained in the house of Palanimalai Goundan, and that the accused came there, dragged him by force and beating him took him to the garden threatening to throw him into the cholam-pit, and made him sleep by him. The witness got up at 4 o’clock in the morning and escaping from the accused gave information of the murder to Angayi’s brother and to the Station House Officer whom he met on the way. He then pointed out the cholam-pit where the corpse was discovered. On the same day an inquest was held and a statement was taken by the Sub-Magistrate from this witness, which substantially tallies with the evidence given by him at the trial. The evidence of this witness that Angayi was in the keeping of the accused receives

corroboration from the evidence of Angayi's brother, who says that himself and his uncle's son went to Kariyampatti, took the deceased from there to the accused's house and in the presence of some people who mediated he demanded some maintenance for his sister. The 4th witness for the prosecution says that on the 8th June 1903—the day before the festival—he went to the accused's garden to demand wages due to him and that he then saw the deceased dunning the accused for money. The Sessions Judge in paragraph 13 of his judgment says that this witness is probably a false witness, though he gives or suggests no reason for discrediting him. I myself see no reason for discrediting the witness, but in a case of this kind I prefer to accept the opinion of the Sessions Judge in the matter and not to base my conclusion on his evidence. The evidence given by the 1st witness is, in my opinion, thoroughly trustworthy and convincing. The fact that he did not disclose the matter until he was beaten and ill-treated by the accused and the fact—if fact it be—that he assisted the accused in hiding the corpse are not circumstances affecting the credit to be given to his evidence; and I am prepared to assume that but for the quarrel between him and the accused and the ill-treatment to which the witness was subjected, he would not have been actuated by any sense of public duty to disclose the commission of the murder by his master and patron. A fortnight having elapsed since the commission of the murder and the burying of the corpse in the cholam-pit without anybody even knowing of the disappearance of the deceased or making enquiries about her, the accused would have felt perfectly secure and in a moment of irritation, when he beat and ill-treated the witness, the idea could not have struck him that it was still in the power of his servant boy to divulge the matter and bring him into trouble.

The learned counsel for the appellant is unable to suggest any reasonable hypothesis as to the murder of the deceased, and believing fully, as I do, that the evidence given by the 1st witness is trustworthy and substantially true, I must hold that the accused has been rightly convicted of murder. He committed the murder deliberately and with a deadly weapon and I regret that I am unable to see any provocation or other extenuating circumstance which would justify the substitution of the sentence of transportation for life for the sentence of death. I, therefore, confirm the sentence passed by the Sessions Judge and dismiss the appeal.



## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson, Mr. Justice Boddam  
and Mr. Justice Bhashyam Aiyangar.

Annakumaru Pillai ... Petitioner\* (*Complainant*).

v.

Muthupayal and others .. Accused.

Annakumaru Pillai v. Muthupayal. *Indian Penal Code, S. 379—Palk's Bay—Gulf of Mannar—Chanks—Subject of theft—Fera natura—Property in Chank-beds.*

Palk's Bay being an arm of the sea land-locked by His Majesty's Dominions and the islands in it also forming part of his territories is not to be regarded as an open sea outside the territorial jurisdiction of His Majesty, but is an integral part of His Majesty's Dominions.

Chanks are not fish. They are not *fera natura* but are *domita natura* and must be placed in the same category as oysters so as to be the subject of theft.

The Rajah of Ramnad has the monopoly of taking chanks in Palk's Bay, and he or the person claiming under him must in law be regarded as being in possession of the chank-bed *propter impotentiam*.

A person taking chanks out of the chank-bed in the possession of the Raja removes movable property out of the possession of the Raja and will be guilty of theft under S. 379, Indian Penal Code.

The Gulf of Mannar is also similar to Palk's Bay and chanks in the chank-beds of that Gulf may also be subjects of theft.

Petition under Ss. 436 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of the Head Assistant Magistrate of Ramnad, dated 7th May 1903 in C. C. No. 17 of 1903. (Criminal Revision Case No. 39 of 1903 on the file of the Sessions Court of Madura).

*S. Srinivasaiyengar* for petitioner.

*P. S. Sivaswami Aiyar* for the accused.

JUDGMENTS:†—*The Officiating Chief Justice*.—The petitioner preferred against the accused a complaint of theft in that the latter had removed a quantity of chanks from a portion of the bed of the sea on the Coromandel Coast, it being alleged by the petitioner that he was entitled to them as one claiming under the Raja of

\* CrI. B. Case No. 313 of 1903.  
(CrI. R. P. No. 217 of 1903.)

12th January 1904.  
† 22nd December 1903.

Ramnad, and that the right to all chanks to be found in certain specified localities on the Ramnad coast inclusive of the portion in question was, from time immemorial, vested exclusively in the holders of the Ramnad Zamindari. The Head Assistant Magistrate of Ramnad, after examining some only of the witnesses cited by the petitioner, dismissed the complaint on the analogy of decisions passed with reference to charges of theft of fishes in open waters.

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The questions which arise for determination in the present case are :—

1. (a). Whether live chanks not actually seized but remaining free in their natural habitat in the bed of the sea are the subject of property ?
- (b). Whether a taking of them would not constitute theft even if they are the subject of property ?
- (c). Is 'possession' within the meaning of S. 379 of the Indian Penal Code predicable in respect of them, with reference to persons entitled to them ?

2. If these questions are to be answered in the affirmative, whether, in the circumstances of the present case, the complainant is in law precluded from establishing an exclusive right to such of them as exist beyond a marine league from low water-mark ?

3. Whether the courts of this country have jurisdiction to try charges of theft of chanks when the removal of the chanks is from a locality outside the said marine league limit ?

It is necessary to preface the discussion of these questions with a few general observations. Chanks are molluscs being species of the genus *Turbinella*. They are found on the coast of the present districts of Madura and Tinnevely on the one side and of Ceylon on the other (Balfour's *Cyclopædia of India*, 3rd Edition, Vol. I, p. 656). They thrive in sand-beds in the seabottom, the sand being of a special nature locally called 'puchimanal' or sand breeding worms (on which the chanks feed)—Report on chank and Pearl-Fisheries by Mr. H. S. Thomas (1884) p. 16, S. 45. Such beds exist all along the abovementioned coasts in depths of 2 to 10 fathoms or thereabouts. (Balfour's

**Annakumaru** Cyclopædia, 3rd Edition, Vol. I, p. 656,) and Dr. Thurston's Notes  
**Pillai** on Pearl and Chank Fisheries and Marine Fauna of the Gulf of  
**v.**  
**Muthupayal.** Mannar (1890) pp. 11 and 31. These beds as well as the beds  
**Offg. Chief** of pearls, oysters (oysters unlike chanks affect rocky ground,  
**Justice.** Mr. Thomas' Report, p. 15; S. 45), the two often lying not far  
 from each other, are to be found at varying distances from the  
 shore, the furthest being 20 miles, though they generally lie much  
 nearer (Dr. Thurston's Notes, pp. 17 and 109, Encyclopædia  
 Britannica, 9th Edition, Vol. V, p. 364.) The beds are of different  
 sizes, some being of very considerable extent, as for instance, the  
 Muttuwarttu Par (5 miles off the coast of Ceylon in Dutch Bay)  
 which is 3 miles by 1½ miles (Dr. Thurston's Notes, p. 103). The  
 situation of the beds has been mapped out and details thereof  
 recorded by the respective authorities, (for Madras Fisheries,  
 see App. B. to Mr. Thomas' Report) and the Ceylon legislature have  
 in respect of the beds belonging to that colony passed ordinances,  
 the earliest, so far as appears, having been enacted in 1811.

The chanks are not fixed to the localities they are found in,  
 but their power of locomotion is very limited, some experiments  
 showing that they move a foot in 1½ minutes to 2½ minutes (Mr.  
 Thomas' Report, pp. 32 and 104) being in this respect similar to pearl  
 oysters (Mr. Thomas' Report, p. 5, S. 11). Chanks alive are known  
 as green chanks, while shells of dead ones, also to be found in the  
 beds, go by the name of white chanks (Balfour's Cyclopædia, Vol. I,  
 p. 656). They are fished up by divers who, with bags round their  
 necks, dive and grope over the bottom, 20 chanks being reckoned  
 a good haul. The divers never go beyond 12 or 13 fathoms and  
 seldom over 9 (Mr. Thomas' Report, p. 26, S. 85, and Mr. Emerson  
 Tennent's Ceylon, 5th Edition, Vol. II, p. 564).

Chank shells have long been used in this country for various  
 purposes. Bracelets are made out of them and are worn largely  
 by women in the Northern parts of India, workmen most skilled in  
 making them being found at Dacca. Another use for them is in  
 connection with Hindu temples and worship, the shells being con-  
 sidered to possess purity, while inferior shells find their use in  
 native homes as vessels for feeding children. It may also be  
 added that native medical men make preparations out of the  
 shells and that the shells are sometimes buried with the bodies

of opulent persons. Valampuri chanks or shells with the whirl on the right are specially prized and fetch high prices. A chank of this description was among the presents sent by one of the kings of Ceylon to Asoka in B. C. 306 (Tennent's Ceylon, Vol. I, p. 446). Naturally, therefore, there has been a considerable trade in chanks from very remote times, and the allusion to them in the *Cosmos Indicopleustes* and by Abu Said in his *Voyages Arabes* points to the existence of the trade as early as the 6th century (Balfour's *Cyclopædia*, Vol. I, p. 653.)

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And chanks as well as pearl-oysters while still in the beds have always been taken to be the exclusive property of the sovereign, by whom, consequently, they have been conserved; and the fishery operations connected therewith have always been carried on under state control and have formed a source of revenue to the exchequer. The Setupatis of Ramnad appear to have enjoyed both the pearl and the chank fisheries on the Ramnad coast while they were feudatory chiefs, but when they ceased to be such the right to pearl fisheries on the coast was apparently taken away, the right to the chank fisheries alone being continued to them. It has been viewed by some that chank fishery operations tend to injure pearl oysters and this view has led to the discontinuance of chank fisheries on the Ceylon coast. Such a notion, however, has been strongly controverted and has not been acted upon with reference to the fisheries on our coast (Mr. Thomas' Report, p. 15, S. 44). Our chank fisheries are worth to Government from four to five times as much as our pearl fisheries and may, it is said, easily be raised to half the present value of the Ceylon pearl fisheries (Mr. Thomas' Report, p. 28, S. 91). These latter brought in to the State in a certain year towards the close of the 18th century as much as £ 140,000 though, under subsequent management, the revenue has never exceeded £ 87,000 in any one year (*Encyclopædia Britannica*, Vol. V, p. 364). According to Dr. Balfour the rents received annually in respect of chank fisheries by the Government of Madras was about £ 1,000, those received by the Setupatis of Ramnad being £ 500 (Vol. I, p. 656). According to the latest information available the average revenue during the 25 years from 1876-77 to 1902-03 (not reckoning 1884-85 in which for some

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reason not apparent there was no fishery) derived by the Madras Government from the chank fisheries under the control of the Superintendent of Fisheries at Tuticorin amounted to Rs. 12,000 (in round numbers) the maximum derived in any one year being that of 1881-82, viz, Rs. 28,000 (G. O. No. 1025, dated 3th October 1903). It may not be superfluous to note that artificial culture of pearl oysters is not deemed to be impracticable, though whether that would be remunerative has been doubted (Mr. Thomas' Report, p. 27, S. 87).

With these observations, I shall now proceed to discuss the questions stated above in their order.

Though undoubtedly what may properly be spoken of as fishes in the open sea are *feræ naturæ* and do not form the subject of property until actually seized, yet I am unable to accept the argument of Mr. Sivaswamy Aiyer on behalf of the accused that chanks stand on an analogous footing. Certainly there can be no comparison between animals like fishes which roam over the wide expanse of the waters darting about with extreme rapidity and which are endowed with the power of eluding attempts to take them unaided by special contrivances, and such localized slow creatures as chanks which a diver can pick up with the same ease with which he can take pebbles at the sea bottom. It seems to me that with reference to the question of property under consideration there is more analogy between chanks and pearl oysters on the one hand, and on the other, the ordinary edible oyster which has formed the subject of judicial determination with reference to that question. So far as that is concerned the circumstance that "edible oysters," borrowing the words of Mr. Thomas, "are from the time they are precipitated as spat immovably cemented for life to rock if they chance to fall on rock, or if they fall on mud lie by their weight helplessly on their heavy convex side," while pearl oysters are not so sedentary but can move very slowly about, is immaterial. The observations of *Green, C. J.*, in *State v. Taylor*<sup>1</sup>, (decided by the Supreme Court of New Jersey) where the prisoner was convicted of theft of oysters, deserve consideration. He said "It is objected that oysters being animals *feræ naturæ* there can be no property in them unless they be dead or

1. 3 Dutcher 117; 72 Am. Dec. at p. 847.

reclaimed, or tamed, or in the actual power or possession of the claimant, and that the want of such an averment is a fatal defect in the indictment \* \* \* The principle as applied to animals *feræ naturæ* is not questioned. But oysters though usually included in that description of animals do not come within the reason or operation of the rule. The owner has the same absolute property in them that he has in inanimate things or in domestic animals. Like domestic animals they continue perpetually in his occupation and without straying from his house or person ; unlike animals *feræ naturæ* they do not require to be reclaimed or made tame by art, industry or education, nor to be confined in order to be within the immediate power of the owner. If at liberty they have neither the inclination nor the power to escape. For the purpose of the present enquiry they are obviously more nearly assimilated to tame animals than to wild ones and perhaps more nearly to inanimate objects than to animals of either description"<sup>1</sup>.

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These observations seem to me to be substantially applicable to chanks and pearl oysters which may, therefore, with perfect propriety, be treated as standing on a par with *feræ domitæ* and like them the subject of absolute property. Supposing, however, they should be treated differently from *feræ domitæ*, there ought, having regard to the extremely limited power of locomotion possessed by these creatures, to be no hesitation in holding, as contended for by Mr. Srinivasa Aiyangar for the petitioner, that they are the subject of property *propter impotentiam*. As to the extent of the property, however, the result should be the same, in view of their weakness in the matter of locomotion being, unlike as in the case of the young of birds, to which reference was made in the argument, not a temporary but a permanent condition. If it would be going too far to ascribe absolute property on the said ground, they would certainly be the subject of qualified property i. e., they would belong to him on whose land they exist so long as they do not migrate therefrom and pass away elsewhere, even supposing they are likely to do so. Apart too, from this view it would be impossible to ignore the fact that for ages in this country chanks and pearl oysters have been owned and enjoyed by the sovereign as belonging by prerogative

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1. 3 Dutcher 117; 72 Am. Dec. at p. 347.

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right exclusively to him, a fact from which it must, with reference to the crown and persons having similar right, be held that they, *ratione privilegii*, are the subjects of property absolute or qualified according to the view to be taken with reference to the nature and capacity of the animals themselves. If, with reference to such considerations the animals are only the subject of qualified property, the owner of the exclusive right, can claim them of course only so long as they do not migrate beyond the limits within which the right is exercisable.

Turning now to branch (b) of the question under consideration, the objection that live chanks even if a subject of property are not the subject of larceny would seem to have reference to the rule of English Criminal Law thus stated in Hale's Pleas of the Crown. "Larceny cannot be committed in some things whereof the owner may have a lawful property, and such whereupon he may maintain an action of trespass, in respect of the baseness of their nature, as mastiffs, spaniels, grey-hounds, blood-hounds, or of some such things wild by nature yet reclaimed by art or industry as bears, foxes, ferrets, etc., or their whelps or calves, because, though reclaimed, they serve not for food but pleasure, and so differ from pheasants, swans, etc. made tame, which though wild by nature, serve for food." But surely it would not be right to impute baseness within the meaning of the said rule to creatures like these in question so harmless during life and so useful after death, one description of them leaving what as already stated lends itself to so many uses in this country and the other containing what on account of their beauty and rarity have always been among the choicest objects of the jewellers' art. If a place must be found for such members of the animal kingdom in the classification of English criminal law, they ought certainly to be treated as animals highly serviceable to man, though otherwise than as food and such serviceableness must according to the principle of the authorities be held to make them the subject of larceny, considering how the law views the case of another animal, prized not as food, the rule as to which is expressed quaintly enough thus; "Only of the reclaimed hawk, in respect of the nobleness of its nature and use for princes and great men, larceny may be committed" (Hale's Pleas of the Crown, Vol. I.

p. 512). However this may be, it is scarcely necessary to say that, under our own criminal law, subject only to the exception provided for by section 95 of the Indian Penal Code, an animal which is recognised as property is *ipso facto* capable of being stolen.

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Now as to the last branch of the question I cannot see what difficulty there can be in holding that chanks and pearls oysters while still in the beds are, within the meaning of S. 379 of the Indian Penal Code, in the possession of persons who may show a title thereto. The circumstance that the subjects of His Majesty and others may navigate the waters could not preclude the predicability of possession in the largest sense of the term with regard to beds forming the subject of these fisheries, on the part of those entitled exclusively to carry on the fisheries. The right of such persons being admitted, it follows that so long as chanks and pearl oysters have not actually been manually taken hold of by strangers, the animals, notwithstanding their continuance in their natural habitat, must, on the principle that "property in personal chattels draws after it the possession" (see *State v. Taylor*<sup>1</sup>) be held to be in the possession of the owner and of none else. That, here, the thing owned lies buried under the waters of the sea, operates rather as a security of the owner's possession than otherwise, as that in many ways interposes serious obstacles in the way of unobserved intrusion on the rights of the proprietors. The bed of the sea being vested in the crown, the soundness of postulating possession in the crown in regard to chanks and oysters belonging to it is too obvious to require further discussion.

As regards the Ramnad proprietor also, the same conclusion would follow if he has the immemorial right claimed. Without intending or seeming to introduce into this country the highly technical distinctions peculiar to the law of England connoted by such terms as common fishery, common of *fishery*, free fishery and several fishery one may admit that there is force in the suggestion made by Mr. Srinivasa Aiyangar that the alleged right of the Ramnad proprietor would not stand on a worse footing than that of a person entitled to a several fishery in England which, it has been held, is a right capable of being vindicated by possessory

<sup>1</sup>, 72 Am. Dec. at p. 348.



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remedies (*Holford v. Bailey*<sup>1</sup> and *Hanbury v. Jenkins*<sup>2</sup>), and in favour of the contention that the dishonest removal of chanks even with reference to such a proprietor would constitute theft under the Indian Penal Code, I may cite *Reg. v. Downing*<sup>3</sup> where a conviction for larceny was sustained by the Court of Criminal Appeal (presided over by *Cockburn, C. J., Channell, B., Keating, J., Brett, J., and Cleasby, B.*) under 24 and 25 Vic. C. 96, which enacted that "whoever shall steal any oyster or oyster brood from any bed laying or fishery being the property of any other person and sufficiently marked out, shall be guilty of a felony," the whole evidence as to the prosecutor's right having been that for a period of 45 years he and his father had, as of right, exercised the right of fishing oysters in the bed from which the prisoner had removed them and which was situated in a tidal navigable river.

Apart from any statute, in *State v. Taylor*<sup>1</sup> referred to above, dishonest removal of oysters was held to be theft; though the removal was from a sound accessible to the public for navigation and fishing, because the oysters remained the property of the prosecutor, he having planted them in the spot wherefrom they were removed, the common law as understood in that country permitting such planting subject to the liability of the oysters being destroyed or removed if they should prove a nuisance or interfere with the public rights of navigation and fishing. Obviously the fact that the Ramnad proprietor claims the chanks not *per industriam* but by immemorial privilege, referring as it does only to the source of his right, cannot affect the question of possession when once the right is allowed.

Before concluding my observations on the present matter, it may not be amiss to draw attention to a provision in one of the several Australian statutes passed for the protection and regulation of the pearl fisheries in Western Australia, as showing the unmistakeable trend of legal thought on the subject. I refer to 50 Vict. No. 14, the Shark's Bay Pearl Shell Fishery Act, 1886, S. 8 of which runs thus; "All pearls and pearl shells lying or contained within the limits of any licensed area shall, during the conti-

1. 13 Q. B. 426.

2. (1901) 2 Ch. 401.

3. 11 Cox. C. C. p. 580.

4. 72 Am. Dec. 347.

nuance of the license, be deemed to be the absolute property of the licensee for all purposes civil or criminal; and all and every person or persons who shall gather, collect, or remove any pearl or pearl shells within or from the limits of licensed area, without the authority of the licensee or his agent, shall be deemed guilty of larceny and shall, on summary conviction of such offence before two or more Justices of the Peace in Petty Sessions, be liable to be imprisoned for any term not exceeding two years, with or without hard labour".

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As to the cases of *The Queen v. Revu Pothadu*<sup>1</sup>, *Subba Reddi v. Munshoor Ali Sahab*<sup>2</sup>, *Hurimoti Moddock v. Deno Nath Malo*<sup>3</sup>, *Bhusun Parui v. Denonath Banerjee*<sup>4</sup>, *Empress v. Charu Nayiah*<sup>5</sup>, and *Bhagiram Dome v. Abur Dome*<sup>6</sup>, to which our attention was drawn on behalf of the accused, I take their *ratio decidendi* to be that fishes being *feræ naturæ* and the waters concerned in the particular cases having been unenclosed waters operating in no way to curtail the power of unrestricted movement and escape of the fishes, a taking of them could not amount to theft as, in the circumstances, they were not until actually caught the subject of property. These cases have no application here for the reason that live chanks are not *feræ naturæ* properly so called, (See the observations of *Westbury, L. C.* in *Blades v. Higgs*<sup>7</sup>) and have already been held to be at least the subject of qualified property even in their natural habitat, shell of dead chanks being of course absolute property in every sense.

I pass on to the next question which involves considerations of no small importance. In dealing with it, I wish before going further to say that *Queen v. Keyn*<sup>8</sup> relied on by Mr. Sivaswamy Aiyer is distinguishable from the present case for reasons which would be best stated in the words of Mr. Justice *Blatchford* who delivered the judgment of the Supreme Court of the United States in *Manchester v. Massachusetts*<sup>9</sup> viz., that "the question there (in *Queen v. Keyn*<sup>8</sup>) was not as to the extent of the

1. 1 L. R., 5 M., 390.

2. 1 L. R., 24 M., 82.

3. 19 Suth. W. R. (Criminal Rulings) 47.

4. 20 Suth. W. R. (Criminal Rulings) 15.

9. 139 U. S. App. 257.

5. 1 L. R., 2 C., 354.

6. 1 L. R., 15 C., 388.

7. 11 H. L. C. 621 at p. 631.

8. 2 Ex. D. 63.

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dominion of Great Britain over the open sea adjacent to the coast but only as to the existing jurisdiction of the Court of Admiralty in England over offences committed in the open sea, and the decision had nothing to do with the right of control over fisheries in the open sea or in bays or arms of the sea." See also *Direct United States Cable Company v. Anglo-American Telegraph Company*<sup>1</sup>.

Passing then to the question in hand it is to be observed that having regard to the fact that the rule as to the territorial waters of a country is founded on the principle that a proper margin is absolutely necessary for the safety and convenience of every country bordering on the sea, and having regard to the fact that the limit of a marine league was arrived at with reference to the shooting power of cannons in former times, while those now in use are of a much longer range; doubts have been raised as to the propriety of maintaining this any longer as the proper limit (Hall's *International Law*; 4th Ed., p. 160). "In 1894 the *Institute de droit International* exhaustively discussed the question and there was no decision or opinion as to the necessity of giving a greater breadth to the Zone, a decided majority favouring a Zone 6 miles from low water-mark as territorial for all purposes with the right in a neutral state to extend it in time of war to a distance from shore equal to the longest range of modern guns". (Taylor's *International Public Law*, p. 294; see also Hall's *International Law*, p. 161, note.) But in the absence of a distinct international concert on the point, the ordinary limit of territorial waters in the open sea should, I presume, be taken to be that referred to above, subject perhaps to the qualification, according to the decision of the Supreme Court of the United States in *Manchester v. Massachusetts*<sup>2</sup> (already referred to), that "all Governments for the purpose of self-protection in time of war or for the prevention of frauds on its revenue exercise an authority beyond this limit."

Be this as it may, certain parts of the sea spoken of as gulfs, bays &c., (Taylor's *International Public Law*, 229 and 230; See also p. 138 *Ibid*) though few in number would seem to be recognized as standing on an exceptional footing, the reason for the excep-

1. L. R. 2 A. C. at p. 416.

2. 139 U. S. App. at p. 240.

tion, as I understand it, being that while in regard to waters truly oceanic exclusive dominion by any particular nation is, in the very nature of things, impossible, such is not the case with reference to the parts of the sea referred to. From the instance of such waters occurring in the books, it is to be gathered that an important element in the determination of the question whether particular waters come within the exception is the position thereof with reference to the territories of the nations claiming special rights therein, for, it is obvious that if waters are encircled to a great extent by the land of one or more states, that conduces to and facilitates the springing up of exclusive rights. Whether in fact such rights have grown up must in the absence of treaties and compacts be a question of use acquiesced in by other nations. The law on this point was fully examined by Lord *Blackburn* who delivered the judgment of the Judicial committee in *Direct United States Cable Company v. Anglo-American Telegraph Company*<sup>1</sup> which related to Conception Bay in Newfoundland and I cannot do better than quote his observations. His Lordship said : "Passing from the Common Law of England to the general law of nations as indicated by the text-writers on international jurisprudence, we find an universal agreement that harbours, estuaries and bays land-locked, belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is bay for this purpose.

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"It seems generally agreed that where the configuration and dimensions of the bay are such as to show that the nation occupying the adjoining coasts also occupies the bay, it is part of the territory ; and with this idea most of the writers on the subject refer to defensibility from the shore as the test of occupation ; some suggesting therefore a width of one cannon shot from shore to shore or three miles ; some, a cannon shot from each shore or six miles ; some an arbitrary distance of ten miles. All of these are rules which, if adopted would, exclude Conception Bay from the territory of Newfoundland, but also would have excluded from the territory of Great Britain that part of the Bristol channel which in *Reg. v. Cunningham*<sup>2</sup> was decided to be in the county of Glamorgan. On the other hand the diplo-

1. L. R. 2 A. C. 394 at 419 and 420.

2. Bell's Cr. C. 72.

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“matists of the United States in 1793 claimed a territorial jurisdiction over much more extensive bays, and Chancellor Kent, in his commentaries, though by no means giving the weight of his authority to this claim, gives some reasons for not considering it altogether unreasonable.

“It does not appear to their Lordships that jurists and text-writers are agreed what are the rules as to dimensions and configuration which, apart from other considerations, would lead to the conclusion that the bay is or is not a part of the territory of the state possessing the adjoining coasts and it has never, that they can find, been made the ground of any judicial determination. If it were necessary in the case to lay down a rule, the difficulty of the task would not deter their Lordships from attempting to fulfil it. But in their opinion it is not necessary so to do. It seems to them that in point of fact the British Government has for a long period exercised dominion over this bay and that their claim has been acquiesced in by other nations so as to show that the bay has been for a long time occupied exclusively by Great Britain ; a circumstance which in the tribunals of any country would be very important.”

Now the question is whether the circumstances of the present case warrant the view that those parts of the sea which contain beds of chank and beds of pearl oysters forming the subject of fishery operations therein, come within the exception already adverted to. The beds referred to lie all along the Indian coast as well as the coast of Ceylon in the gulf of Mannar. This gulf is, no doubt, quite open towards the south but is otherwise almost wholly surrounded by land, i. e., on the west by the Indian mainland, on the east by Ceylon, and on the north by Adam's Bridge, and its contiguous islands forming one continuous barrier separating the gulf from Palk's Bay. The latter is comparatively much smaller, and is difficult of navigation owing to its shoals, currents and sunken rocks. The passage from the bay into the gulf lying between the mainland and Rameswaram is quite a narrow one being only 1,350 yards in breadth (Dr. Thurston's Bulletin No. III, p. 82) and 10 to 15 feet deep in low water notwithstanding its having been deepened by our Government some years ago.

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1. L. R. 2 A. C. at 419, 420.

The gulf itself was similarly deepened by our Government to admit of ships of greater draught (Balfour's Cyclopædia. Vol. I, p. 1263). The gulf at its widest (between point de Galle in Ceylon and Cape Comorin) is 200 miles while in its northernmost parts its width is only 17 miles; from north to south the gulf is about 130 miles.

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Such being the position and circumstances of the gulf and the surrounding country having from very early times, been inhabited by comparatively civilized races, the gulf, moreover, being, as it were, stocked with the already mentioned rich sources of wealth and commerce, the rulers of those races who were shrewd enough to make revenue out of the sea water by making the manufacture of salt a state monopoly, were of course not slow in making revenue out of those sources as well. The fisheries in question were thus established and have been handed down from sovereign to sovereign until about the end of the 18th or the beginning of the 19th century they became vested in the British. All this is clearly told by authentic historians and travellers and for the present purpose it is not necessary to make more than a few references.

"Friar Jardanus, a quaint old missionary bishop" says the author of the article on Pearl in Balfour's Cyclopædia, "who was in India in 1330, says that 8,000 boats were engaged in this fishery and that of Ceylon and that the quantity of pearls was astounding and almost incredible. The Head-quarters of the fishery was then, and indeed from the days of Ptolemy to the 17th century continued to be, at Chaylorcoil, literally, the temple, on the sandy promontory of Ramnad, which sends off a reef of rocks towards Ceylon known as Adam's Bridge. And *Ludovico de Vathema* mentions having seen the pearls fished for in the sea near the town of Chayl in about A. D. 1500; and Barbosa, who travelled about the same time, says that the people at Chayl are jewellers who trade in pearls. This place is, as Dr. Vincent has clearly shown, the Koru of Ptolemy, the Kolkhi of the author of Periplus, the coil or chayl of the travellers of the middle ages, the Ramanadkoil (temple of Rama) of the natives, the same as the sacred promontory of Ramnad and the isle of Rameswaram, the Head-quarter of the Indian pearl fishery from time immemorial." Though in this passage no express allusion is made to the fisheries being King's monopoly,

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that undeniable and well known fact is mentioned elsewhere. For example, Sir James Emerson Tennent in his work on Ceylon observes : "Monopolies are to the present day a prominent feature of the Ceylon revenue. The fishery of pearls and chanks has been, from time immemorial, in the hands of the sovereign" (5th Edn., Vol. II, p. 169). That this was also the case with regard to the fisheries on the opposite coast, that of Tinnevely and Madura, while the country was still in the hands of Hindu rulers and down to a period not long anterior to the accession of the Nawab of the Carnatic to power, will be seen from the following extracts which I make from Nelson's Manual of the Madura country :—"Another and a productive source of revenue was the greater pearl fishery which was carried on annually from cape Camorin to the Island of Pamban. A rough idea of its value may be formed from a statement in a Jesuit letter of the year 1700 which describes the fishery, to the effect that the Dutch used to grant licences to fish for pearls to all applicants at a uniform rate of about 60 Ecus for each vessel employed in the fishery, and that sometimes as many as 600 and 700 vessels were so employed. The net sum realized must, therefore, have been about 36,000 Ecus. And it was realized from the fishery along the Tinnevely coast only ; the Ramnad coast being then fished by the Sethupathi, to whom it belonged" (p. 154, Part III, Nelson's Madura Manual.)

" They durst not attempt to coerce either the Sethupathi or the king of Madura and they took nothing by an embassy which they sent to the former, together with some valuable presents, for the purpose of inducing him to make over to them all his right and title to the profits of the pearl fishery on his coast. They had obtained from the king of Madura the monopoly of the fishery of the Tinnevely coast and drew a considerable revenue from license to fish which they granted to all applicants " (page 227, *ibid*).

" And the conch shell fishery must also have produced a considerable revenue if, as seems probable, the King enjoyed the monopoly of it (p. 154, *ibid*). The conch shell fishery was also theirs (belonging to the Dutch) within the same limits as the pearl fishery and yielded a considerable profit" (p. 227, *ibid*). It is scarcely necessary to add that it is matter of quite recent history

that the fisheries on the said coast of the mainland passed into the hands of the East India Company on the cession to it by the Nawab of the Carnatic of the revenues thereof, while the Ceylon fisheries vested in the British Crown on the conquest of Ceylon from the Dutch.

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Now considering that the various European maritime powers, who from about the 16th century were contending for supremacy in the Indian seas, raised no question as to the right of the sovereigns for the time being of the Carnatic and Ceylon to their respective fisheries, there can be little doubt that such right was regarded by one and all of them as unassailable. Nor is high authority in terms referring to and recognizing it wanting. Vattel, himself a strong adherent of the doctrine that the open sea is not susceptible of exclusive dominion, while dealing with the question of special appropriation of parts of the sea, writes thus in a well-known passage: "The various uses of the sea near its coast renders it very susceptible of property. People there fish and draw from thence shells, pearls, amber, &c. Now in all these respects its use is not inexhaustible; so that the nation to whom the coasts belong may appropriate to itself an advantage which it is considered as having taken possession of and make a profit of it in the same manner as it may possess the domain of the land it inhabits. Who can doubt that the pearl fishery of Bahrem and Ceylon may not lawfully be enjoyed as property? And though a fishery for food appears more inexhaustible, if a nation has a fishery on its coast that is particularly advantageous, and of which it may become master, shall it not be permitted to appropriate this natural advantage to itself as a dependence on the country it possesses?" (Book I, Ch. XXIII, S. 287, p. 115, Translation of 1759).

With so emphatic a pronouncement by such a publicist as to the lawfulness of the exclusive possession of the fisheries in question unbrokenly enjoyed from ancient times and with instances of exclusive occupation which have taken place almost under our own eyes with reference to pearl fisheries in Shark's Bay, &c., in Western Australia and which include pearl banks beyond the marine league limit, one may with confidence lay down that, to say the least, the parts of the sea falling between the respective coasts and the lines opposite each connecting the extreme points seawards of the limits



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of the fisheries in question, are British territorial waters. It, therefore, follows that the petitioner is not precluded in law from making out a good title to chanks in the localities specified by him, by the mere fact that they lie beyond the distance of a marine league from low water mark, if he can show that the immemorial right under which he claims extends to such localities.

As regards the last question in the view I take as to the territorial character of the waters in which the fisheries exist, it would, from *Reg. v. Cunningham*<sup>1</sup> where it was held that an offence committed in a part of the Bristol Channel more than 3 miles from the shore was within the jurisdiction of the authorities of the country of Glamorgan, of course follow that our courts likewise have jurisdiction over offences committed in the parts of the sea in question, though the spots in which the offences are committed lie beyond a marine league from the shore. I would therefore set aside the order of the Head Assistant Magistrate, direct him to restore the complaint to his file and dispose of it in accordance with law.

*Russell, J.*—This is a criminal revision petition against the order of discharge by the Head Assistant Magistrate of Ramnad.

The question raised is whether “chanks” in the open sea can be the subject of theft.

The Magistrate holds that a chank is a fish and is *feræ naturæ*, and as it was not shown that the chanks in the present case were removed from an enclosed space, or that breeding operations were carried on in regard to them, the conclusion arrived at by the Magistrate was that those chanks cannot be said to be in the possession of any one until they are removed, therefore they were not stolen from the petitioner.

The Sessions Judge before whom the matter came in revision, declined to interfere on the ground that the open sea could not be said to belong to the petitioner and chanks caught in the open sea could not be the subject of theft.

The Government Pleader appears in support of the order of the Magistrate and has argued that no exclusive right by prescription as to fishing in the open sea could be acquired by the Rajah

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1. Bell Cr. C. 72.

of Ramnad. It is as a lessee of the Raja of Ramnad that the petitioner asserts his rights.

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The chank and pearl fishery beds along the coast of Tinnevely and Madura have all been located and mapped out. It is a matter of common knowledge that these fisheries are a source of some revenue to Government, but Government, I take it from the appearance of the Government Pleader in this case, does not take up the position that chanks can be the subject of theft.

My conclusion in this case is based upon three simple propositions.

- (1). The Gulf of Mannar is part of the high seas in which the crown claims no special rights or jurisdiction.
- (2). The Raja of Ramnad is not the owner of the bed of the sea below low water mark.
- (3). Chanks are *feræ naturæ*.

I say the Gulf of Mannar is part of the high seas from its size, configuration and geographical position. In the present case the Crown has not asserted any special rights in respect of any portion of the gulf and in this revision case I do not think we are entitled to assume that the Crown would, in fact, under any circumstances, assert any such right.

As to the ownership of the bed of the sea, it may be admitted that the authorities are not uniform on the subject. I, however, accept the reasoning and conclusion of Cockburn, C. J., in *The Queen v. Keyn*.<sup>1</sup> This no doubt was a case which applied only to the coasts of Great Britain, but the reasoning and conclusion, I consider, applies equally to this country. I hold that the Crown does not own the bed of the sea below low water mark. The Government Pleader does not now assert that any such ownership vests in the Crown either by right of user or legislation. The argument on behalf of the petitioner is that he is the owner of the "several fishery" in respect of chanks of the Ramnad littoral shores, and that this right carries with it the ownership of the soil of the sea. I do not admit the validity of this argument. In this case I do not wish

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1. 2 Ex. D 62 at page 193 and the following pages.

Annakumaru Pillai v. Muthupayal. Russell, J. to say anything which might unnecessarily interfere with any civil rights possessed by the petitioner. It is not necessary for me to deny that the petitioner may have a right to fish for chanks, though I may point out that there is authority for the position that a grant of the several "fishery" claimed could not be presumed, as it would be invalid if the soil of the bed of the sea does not vest in the Crown, which is the view I take. Coulson on Waters, 2nd edition, p. 358.

If this view be correct, it follows that chanks before they are caught could not be looked upon as being in the possession of the petitioner, and, therefore, there is no property in them either absolute or qualified till they are caught. Hence the following cases referred to by Mr. Srinivasa Aiyangar for the petitioner cease to be in point :—*The Queen v. Shickle*<sup>1</sup> and *Blades v. Higgs*<sup>2</sup>.

My third proposition is that chanks are in the same category as fishes and are like the latter *feræ naturæ*. Chanks are free to move as they like. No doubt their movements are slow but they are probably more difficult to catch than most fish. To catch chanks experienced divers are necessary and, even then considerable difficulty must be felt in catching them. The difficulties experienced in catching chanks compared with fish must therefore be a question of degree. I do not see how chanks can be considered as tame creatures.

If the chanks in the present case are to be classed in the same category as fish, as I think they must be, there are decisions without number to the effect that they cannot be the subject of theft as there is no property in them till they are caught.

I have not been able to find any case analogous to the present in which it has been held that a theft has been committed. I may here remark that I think the case of *State v. Taylor*<sup>3</sup> is clearly distinguishable from the present one. Taylor was convicted of larceny in respect of oysters. The oysters were bred by the complainant in the sea at a place between high and low water-mark where the public generally had a right to fish. "The jury were instructed that if the same oysters which were planted by Hildreth"—who was the complainant "were unlawfully taken by

1. L. R. 1 C. C. R., p. 158.  
2. 11 H. L., C. p. 621.

3. 72 Am. Dec. p. 348.

the defendant with the intent to steal them ; if the oysters so planted could be easily distinguishable from the oysters that grow in the sound ; if they were planted in a place where oysters did not naturally grow ; if the place where they were planted was marked and identified so that the defendant and others going into the sound for clams and oysters naturally growing there could readily know that these oysters were planted and held as private property and were not natural oysters, then the oysters were the subject of larceny and the defendant might be convicted." No doubt the decision is an authority for the proposition that oysters under certain circumstances can be the subject of theft ; but it is also an authority for the proposition that if oysters grow naturally in the sea they are not the subject of theft.

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*Reg. v. Downing*<sup>1</sup>, practically turns on the same point as *State v. Taylor*<sup>2</sup>, and unquestionably decides that oysters can be the subject of theft if dishonestly removed from a private oyster bed. Before, however, these decisions could be applied to the facts of this case, it would have to be found that the chanks were produced by breeding operations much like oysters in places in the sea which the petitioner had appropriated for that purpose. There is no suggestion in the present case that the chanks were produced by breeding. They in fact are the natural product of the sea. So that it appears to me the cases cited are not all on all fours with the present case. I may assert, therefore, I think, that no case has been brought to notice where a person has been convicted of larceny or theft in respect of an oyster or chank produced naturally in the sea.

The special legislation which has taken place in Australia does not, in my opinion, affect the position. It has there been enacted that under certain circumstances a person who removes oysters from the open sea shall "be deemed" to be guilty of larceny. It does not follow therefore that in the absence of such legislation a person who removes chanks has committed theft as defined in the Indian Penal Code.

I might support the general conclusion at which I have arrived by asserting the broad proposition that in the high seas where these chanks have been caught all subjects of the Crown have an

1. 11 Cox C. C. R. 580.

2. 72 Am. Dec. 348.

Annakumar equal right to fish : but I do not wish to complicate the discussion  
 Pillai unnecessarily. In my view no theft has been committed because  
 v. the chanks in the present case are *feræ naturæ* as fish are, and they  
 Muthupayal. have been produced naturally in the sea in beds which the Raja of  
 Russell, J. Ramnad cannot claim to be his exclusive right.

I agree with my learned colleague in the opinion that if an offence has been committed, the Courts have jurisdiction to try it.

I think the petition should be dismissed as no offence has been committed.

The Court being divided in opinion, the case was ordered by the Honourable the Officiating Chief Justice to be posted before Mr. Justice Benson, Mr. Justice Boddam and Mr. Justice Bhashyam Aiyangar.

*S. Srinivasa Aiyangar* for petitioner.

*T. R. Venkatarama Sastri* for *P. S. Sivaswami Aiyar* for respondent accused.

JUDGMENT.\*— In this case the complainant charged certain persons with having committed the offence of theft of chanks from the chank beds leased to him by the Rajah of Ramand off the coast of his Zamindari.

The Head Assistant Magistrate discharged the accused on the ground that chanks are fish and are *feræ naturæ* and in this case were taken from beds in the open sea and were therefore not taken from the possession of any person and could not be the subject of theft. The case came up for revision before a Bench of this Court composed of the Officiating Chief Justice and Russell, J., but, as they were unable to agree, the case was posted before us and our late colleague *Sir Bhashyam Aiyangar* for argument and disposal. We have no doubt that the grounds on which the accused were discharged are untenable, and that the chanks in question were capable of being the subject of theft.

The offence of theft under the Indian Penal Code is committed if there is a dishonest taking of moveable property out of

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\* 12th January 1904.

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the possession of another ; and the question for our decision are whether the chanks in question were capable of being regarded in law as the property of the lessee of the chank beds, and of being in his possession before their alleged taking by the accused. We have no doubt that both these questions must be answered in the affirmative. It was agreed before us that the beds from which the chanks were taken are situated in Palk's Bay, not the Gulf of Mannar, as supposed by *Russell*, J. Palk's Bay is a large stretch of sea water lying between the coasts of India and Ceylon. It is roughly 10 miles long by 50 or 60 broad, is bounded on the north, west and south by the Indian districts of Tanjore and Ramnad and on the east by Ceylon. There is a narrow passage, three-fourths of a mile wide, connecting it on the south with the Gulf of Mannar, which also lies between India and Ceylon. This passage is known as the Straits of Panban and it separates the mainland from the large island of Rameswaram, which forms part of the Indian district of Ramnad, and from which a continuous line of coral reefs known as Adam's Bridge, extends to the island of Ceylon. The passage was deepened some years ago, but is even now only 10 to 15 feet in depth. At its north-eastern extremity Palk's Bay opens into the Bay of Bengal by a strait which is not more than one-ninth of the circumference of the bay. It will thus be seen that Palk's Bay is a bay, or arm of the sea, landlocked by His Majesty's dominions for eight-ninths of its circumference, and it also contains a great number of islands which form part of the districts to which they are adjacent on the Indian and Ceylon sides respectively. There is ample historical evidence which has been referred to in the judgment of the learned Officiating Chief Justice, and which we need not recapitulate, to show that this bay, and also parts of the adjacent Gulf of Mannar, have been effectively occupied for centuries by the inhabitants of the adjacent districts of India and Ceylon respectively.

We do not think that Palk's Bay can be regarded as being in any sense the open sea and therefore outside the territorial jurisdiction of His Majesty. We regard it rather as an integral part of His Majesty's dominions, the portions adjacent to India being within the jurisdiction of the Indian authorities, and the portions

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adjacent to Ceylon being within the jurisdiction of the authorities of that place. That this is the correct view is, we think, clear from the case of *Reg. v. Cunningham*<sup>1</sup> in which it was decided that the Bristol Channel, lying between England and Wales, was a part of Great Britain. *Cockburn*, C. J., in delivering judgment said: "The principle on which we proceed is that the whole of this inland sea, between the countries of Somerset and Glamorgan, is to be considered as within the counties by the shores of which its several parts are respectively bounded." Referring to this judgment Lord *Blackburn* in delivering the Judgment of the Privy Council in the *Conception Bay Case*<sup>2</sup> said: "This much was determined, that a place in the sea, out of any river, and where the sea was more than ten miles wide, was within the county of Glamorgan, and consequently in every sense of the word within the territory of Great Britain. It also shows that usage and the manner in which that portion of the sea had been treated as being part of the county was material." His Lordship then proceeded: "Passing from the Common Law of England to the General Law of nations, as indicated by the text writers on International jurisprudence, we find an universal agreement that harbours, estuaries and bays landlocked belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is "bay" for this purpose. It seems generally agreed that where the configuration and dimensions of the bay are such as to show that the nation occupying the adjoining coasts also occupies the bay, it is part of the territory." He then stated that no precise rule had been laid down or was required to be laid down in the case before their Lordships as "it seemed to them that, in point of fact, the British Government had for a long period exercised jurisdiction over this bay and that their claim had been acquiesced in by other nations so as to show that the bay had been for a long time occupied exclusively by Great Britain, a circumstance which in the tribunals of any country would be very important," and which we may add would be conclusive as against a subject of Great Britain. Applying these considerations to the present case, and comparing the configuration and dimensions of Palk's Bay with those of the Bristol Channel and of Conception Bay, and considering the evidence that exists as to the occupation of Palk's Bay by the British with the acquiescence of

1. Bell Cr. C. 86.

2. L. R., 2 A. C. 419.

other nations, we have no hesitation in holding that it is just as much an integral part of His Majesty's dominions as are the Bristol Channel and Conception Bay, and that the chank beds where the alleged offence was committed, which are five miles off the coast of Ramnad at Mudiampatnam, are part of the territories of British India.

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The decision in the case of *The Queen v. Keyn*<sup>1</sup> relied on by the respondents, referred to the jurisdiction of the Court of Admiralty in England over offences committed in the open sea, and has no application to such a state of facts as exists in the present case.

Such, then, being the correct view as to the character of the place where the alleged offence was committed, we proceed to consider whether chanks taken from it can be the subject of theft.

It is, of course, quite incorrect to regard chanks as, in any sense, fish. No doubt they may be popularly included among "shell fish" but neither Zoologically nor legally have they any of the essential characteristics of fish. They are large molluscs. The shell in which the living mollusc resides is six or seven inches long, and may weigh as much as a couple of pounds. They are found buried in a particular kind of sandbed, or in the sandy crevices of the coral reefs which abound in the bay. They can crawl slowly, a foot or two in a minute, but they are incapable of rapid motion or of saving themselves from being captured by any one who proceeds to take them. They are gathered by divers, who sometimes collect as many as twenty at a haul. The chank beds on which they lie are all carefully mapped out, and full details respecting them are recorded by the authorities. They lie at various depths in the water from 2 to 10 or 12 fathoms. Live chanks are known as green chanks, and the shells of the dead animals are known as white chanks. Both are collected and are articles of very considerable utility and commercial value. The evidence shows that for many hundreds of years they, like the pearl oysters which are generally found in adjacent beds, have been the monopoly of the rulers of the country both in India and Ceylon, and that licenses to gather them have been granted by the sovereign. In addition to the facts stated by the Officiating Chief Justice in his

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1. 2 Ex. D. 63.



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judgment, we may say that, when it was determined to make a permanent settlement of the revenue of the Ramnad Zemindari in 1802, we find the "chank royalty" named as one of the eight heads of revenue on which the permanent assessment was fixed (Nelson's Manual, Part IV, p. 155), and it appears that in 1803 this chank royalty was hypothecated to Government as security for arrears of revenue. In 1874 the chank royalty "in the seaports mentioned in the margin" (which included Mudiampatnam now in question) was attached for arrears of revenue, and so lately as 1899 and 1900, Government itself leased the chank fisheries from the Zemindar. A great deal of learned argument has been addressed to us on the subject of animals *feræ naturæ* and the English Law of larceny in regard to them. If it were necessary to decide whether chanks should be classed as *feræ naturæ* or as *domitæ naturæ* we should certainly hold that they belong to the latter class. It is not easy to regard a chank as being of a "wild disposition" (*feræ naturæ*). There is no evidence that it ever migrates from the bed in which it is born and its power of locomotion is so small that it is powerless to escape from any one who desires to take it.

It has been judicially held in America that for legal purposes oysters "are obviously more nearly assimilated to tame animals than to wild ones, and perhaps more nearly to inanimate objects than to animals of either description." In this view we concur and we think that chanks may properly be placed in the same category with oysters. The fact that fish in a river or in an open and unenclosed tank have been held by the courts in India not to be the subject of theft is irrelevant, because they are so held by reason of their power to escape up or down the river or out of the tank and cannot therefore be regarded as in the possession of the owner of the tank. But even fish if in an enclosed tank, so as to be under the control of the owner of the tank, are capable of being the subject of theft (*Queen Empress v. Shaik Adam Valad Shaik Farid*<sup>1</sup>;) and even the young of wild birds, such as hawks or herons, if found on a man's land may be the subject of larceny *propter impotentiam*, owing to their inability to escape capture, or to pass from the possession of the owner of the land, though the old birds may not be the subject of larceny<sup>2</sup>. Even

1. 72 Am. Dec. at 847.

2. I. L. R., 10 B. 193.

3. Stephen's Com., 18th Ed. Vol. II, p. 6.

if chanks are in a certain sense *feræ naturæ*, we think that they should still be regarded as in possession of the owner of the chank bed *propter impotentiam*, and, therefore, capable of being the subject of larceny. The Indian Penal Code, however, in dealing with theft has no special provisions regarding animals *feræ or domitæ naturæ*. The question in each case is whether the animal is the property of another and was dishonestly taken out of his possession. It seems to us that there is nothing in the nature of a chank whether it be the dead shell or the living mollusc which prevents it from being the subject of property, and that when it lies in its sandbed under the sea, it is as much in the possession of the owner of the said bed as are the coal that lies buried in the ground, and the snail that crawls on the dry land, and the worm that burrows in the earth in possession of the owner of the land where they are found. The exclusive property in these chanks has, in fact, been held by Government from time immemorial and has been leased out for the benefit of the public revenue, and this is in accordance with the common law of the country which recognizes the power of Government to make settlements or grants for purposes of revenue of all unsettled and unappropriated lands, whether covered by water or not covered by water, and, therefore, of the produce or portions of the produce of such lands. (*Hori Das Mal v. Mahomed Jaki*,<sup>1</sup> per Garth, C. J. on behalf of the Full Bench; and *Viresa v. Tatayya*<sup>2</sup>).

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In our view, then, the chanks which the accused in this case are alleged to have stolen were capable of being the subject of theft, and were taken not from the bed of the high seas but from an arm of the sea which is part of the territory of British India, which has been in possession of the Crown from time immemorial. It is not denied that the Crown has included the revenue derivable from the chanks in the permanent settlement of the Zemindari under Regulation XXV of 1802 and that the Ramnad Zemindar has leased them to the complainant. If the taking of the chanks was dishonest it would be theft.

We must, therefore, set aside the order of discharge and direct the Head Assistant Magistrate to restore the case to his file and

1. I. L. R., 11 C. 434.

2. I. L. R., 8 M. 467.

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Our learned colleague, *Sir Bhashyam Aiyangar*, does not sign this judgment as he is no longer a member of the court, but he has expressed his concurrence in it.

### IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir. S. Subramania Aiyar, *Offg. Chief Justice*  
and Mr. Justice Bhashyam Aiyangar.

Subba Pillai ... Appellant\* (*Plaintiff*).  
v.

Ramasamy Aiyar ... Respondent (*Defendant*).

**Subba Pillai v. Ramasamy Aiyar.** *Legal Practitioners' Act, Ss. 27 and 28—Outfees disbursed by Vakil—Pronote by client for such outfees—Pronote not filed in Court—Validity of pronote—Right of Vakil to claim recovery—Lien upon sums received from Court.*

A promissory note taken by a Vakil from his client for an amount not advanced by way of loan but disbursed by the Vakil at the request of the client for outfees in the suit in which he is retained as Vakil is within the meaning of S. 28 of the Legal Practitioners' Act an "agreement respecting the amount of payment for charges incurred or disbursements made" by the Vakil in respect of the suit in which he is retained as Vakil and if not filed in court is void under that section.

The section is general and is not restricted in its operation to agreements which provide for the payment of a larger amount than the disbursements actually made for outfees or of a lump sum irrespective of such disbursements or for payment of pleader's fee in excess of what may be allowed under the Rules framed under S. 27 of the Legal Practitioners' Act.

*Rasi-ud-din v. Karim Bakhsh*<sup>1</sup>, and *Sarat Chunder Roy Chowdhry v. Chandra Kanta Roy*,<sup>2</sup> dissented from.

Although such agreement may be invalid the pleader is not disentitled, in the absence of any agreement, to claim the repayment of outfees advanced by him or reasonable remuneration in respect of his professional services.

*Rama v. Kunji*,<sup>3</sup> and *Krishnasami v. Kesava*,<sup>4</sup> followed.

\* S. A. No. 254 of 1902.

3rd November 1903.

1. I. L. R., 12 A. 169.

3. I. L. R., 9 M. 375.

2. I. L. R., 25 C. 806.

4. I. L. R., 14 M. 63.

The Legal Practitioners' Act does not enact that no claim by a pleader for professional services rendered or for recovery of outfees advanced shall be sustainable unless an agreement in writing for the same has been entered into with the client and filed in court but only that an agreement, if any, entered into in respect of the same shall be void and unenforceable unless the same has been reduced to writing and filed in court.

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A Vakil who disburses outfees at the request of his client and takes a pronote for them which not being filed in court becomes void is entitled to recover such outfees independent of the void promissory note and is entitled under S. 217 of the Contract Act to retain the same out of the sums received by him to the credit of his client in the suit in which he has disbursed the outfees.

*Quære* :—Whether a Vakil will be entitled in the absence of express authority from the client to retain out of monies received by him in one suit fees or outfees due or disbursed by him in another suit.

Second appeal from the decree of the Court of the Subordinate Judge of Negapatam, in A. S. No. 23 of 1901 presented against the decree of the Court of the District Munsif of Kumbakonam in O. S. No. 590 of 1899.

The facts of the case are the following. The defendant was the pleader of one G. the deceased brother of the appellant, in a suit for partition brought by the said G. He advanced money for this suit at the request of the said G. who gave him a letter and also a pronote. The defendant was also the pleader of G. in other suits in which the appellant was a co-plaintiff with his brother. Certain sums of money were paid into court in these latter suits. Before they were paid over, G. died and the appellant became entitled to the whole as survivor. The defendant drew these amounts out of court, paid a portion to the appellant and appropriated the rest for the advance he made in the partition suit, for the fees due to him in that suit and for fees alleged to be due to him in other suits as well. The plaintiff sued the defendant for the recovery of the balance. The District Munsif gave him a decree, but the Sub-Judge on appeal modified it by omitting the items of advances made by him in the partition suit, and fees due to the defendant in the suits in which the amounts were drawn by the defendant. The Sub-Judge also deducted the fee due to defendant in the partition suit on the ground that G had authorized him to appropriate such fee out of those sums. The plaintiff preferred this second appeal.

*P. S. Sivaswami Aiyar* for appellant.

*V. Krishnaswami Aiyar* for respondent.

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*P. S. Sivaswami Aiyar* for appellant:—If a Vakil takes a pronote for his fees, he cannot have a lien. In *Groom v. Cheesewright*<sup>1</sup> the solicitor took a mortgage security and that was considered as discharging the lien (*Bhashyam Aiyangar, J.* There it was a mortgage). In *In re Taylor, Stileman & Underwood*<sup>2</sup> *Lindley, L. J.* lays down that it is the duty of the solicitor to inform the client of his intention to preserve his lien in addition to the security [*Bhashyam Aiyangar, J.* This is not exactly a lien. There can be no lien over money. It is rather the right of retainer]. See also *In re Douglas Norman & Co.*<sup>3</sup>. With regard therefore to Rs. 200 advanced on the pronote, the Vakil has lost the lien by taking the pronote.

And again, the pronote, not having being filed in court under S. 28, the defendant cannot rely upon it.

As the item of Rs. 94 is not due in respect of the suit in which the money was drawn, the Vakil is not entitled to retain it out of the amount. [*Bhashyam Aiyangar, J.* That was in respect of fees due to him in the partition suit against your very client.]

*V. Krishnasami Aiyar* for respondent:—As regards Rs. 94 the court found express authority to appropriate and the finding of fact is conclusive. As regards the other objection the section of the Legal Practitioners' Act does not apply to this case. The section is intended to apply to cases where there is a stipulation for a lump sum irrespective of actual costs or profits. Whatever is advanced for the suit at the request of the party he is entitled to recover it, apart from any question of remuneration. The provisions here and in England are the same.

With reference to fees they have held in *Rama v. Kunji*<sup>4</sup> and *Krishnasami v. Kesava*<sup>5</sup>, *Razi-ud-din v. Karim Bakhsh*<sup>6</sup>, that irrespective of the agreement the Vakil can recover the amount as for work and labour done.

Independently of the agreement, he can recover the advances. The advances are on a better footing than fees inasmuch as the former is a definite sum and has not to be determined by court. I refer to Ss. 28, 29, Legal Practitioners' Act. The last clause of S. 29 and S. 30 are significant. The effect is that the Vakil shall

1. (1895) 1 Ch. 730.  
2. (1891) 1 Ch. 590.

3. (1898) 1 Ch. 199.  
4. I. L. R., 9 M. 375.

5. I. L. R., 14 M. 63.  
6. I. L. R., 12 A. 169.

be confined to the limit mentioned in the agreement and not be entitled to fall back and demand more than is provided in the agreement. I may refer also to S. 31 which rather refers to the policy of the law. The Legislature could not have contemplated that the Vakil should first receive the fees and then conduct the case. That is not the practice in England. The English Act is 33 and 34 Vic. ch. 28, Ss. 4, 5, 6 and 7 [*Bhashyam Aiyangar, J.* The word agreement then is used in the sense of express agreement]. That is exactly so. There is a Calcutta case which dissents from the Madras case : *Sarat Chunder Roy Chowdhry v. Chundra Kanta Roy*,<sup>1</sup> [*Bhashyam Aiyangar, J.*, can we allow interest in the absence of agreement]. According to the English practice it is so.

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As regards the other point, I would refer to *In the matter of McCorkendale*<sup>2</sup>. If the pro-note as an express agreement goes, the question of waiver arises. Even if otherwise the taking of a pronote is no discharge of a lien. Cordery on Solicitors, p. 305. [*Bhashyam Aiyangar, J.* Suppose you negotiate it]. If it has been negotiated it may be another matter. But, otherwise, it does not make any difference.

*P. S. Sivaswami Aiyar* in reply.

**JUDGMENT:**—The two items allowed by the Lower Appellate Court in favour of the respondent to which objections were taken by the appellant's Pleader are (i) an item of Rs. 94-1-0 being the share of Govinda Pillai, the appellant's deceased brother, in the sum drawn (by the respondent) from the court in S. C. S. No. 1938 of 1895 and (ii) an item of Rs. 200 being the amount of a promissory note made by Govinda Pillai in favour of the respondent.

As regards the first item, the respondent's plea was that he appropriated the amount towards the fees due to him in O. S. No. 14 of 1895—a suit for partition against the present appellant which abated on the death of Govinda Pillai, the plaintiff therein—and that he was also authorized by Govinda Pillai to do so. The lower appellate Court refers to this question of authorization as the 3rd

1. I. L. B., 25 C. 805.

2. I. L. B., 6 C. p. 1.

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question for decision in the appeal before it and records (on it) a finding in the affirmative—in favor of the present respondents. There is evidence in the case in support of this alleged authority, and we accept the finding of the Subordinate Judge on this point. It is, therefore, unnecessary to consider whether even in the absence of such authority, the respondent would be entitled, as found by the Subordinate Judge, to appropriate this item which was drawn in S. C. S. No. 1938 of 1895, for fees due to him (by Govinda Pillai) not in that suit but in another suit, namely, O. S. No. 14 of 1895.

As regards the second item, if the amount of the promissory note were in reality, a sum advanced by way of loan to Govinda Pillai, the respondent's remedy would be only on the promissory note, and he would have no lien under S. 217 of the Indian Contract Act, on any sums received by him (from courts) on behalf of Govinda Pillai, his client, and the promissory note would not be invalid under S. 28 of the Legal Practitioners' Act. But reading the promissory note (Exhibit I, dated the 11th November 1896) along with the letter (Exhibit II, dated the 7th October 1896) of Govinda Pillai, to the respondent, it is clear that the amount of the promissory note was not an amount advanced by way of loan, but an amount which, at the request of his client, the respondent disbursed for outfees in the suit in which he was retained as vakil. In this view, the questions arising for decision are whether the promissory note is invalid under S. 28 of the Legal Practitioners' Act, and whether the respondent is entitled, under Ss. 217 and 218 of the Indian Contract Act, to a lien in respect of the amount and can deduct the same out of the sum received by him (from court) on account of his client—it being conceded that the respondent's claim if any, on the promissory note, whether by suit or by set off, was barred at the date of the suit.

We are clearly of opinion that the promissory note—for payment on demand of the sum of Rs. 200 with interest thereon at one per cent *per mensem* is, within the meaning of S. 28 of the Legal Practitioners' Act, an agreement respecting the amount of payment for charges incurred or disbursements made by the respondent, in respect of the suit in which he had been retained as a vakil, and as the same has not been filed in court as required by

the section, it is invalid. The section is general and there is nothing to restrict its operation to agreements which provide for the payment of a larger amount than the disbursements actually made for outfees, or of any lump sum, irrespective of such disbursements or for payment of pleader's fee in excess of what may be allowed as such on taxation between party and party in accordance with the rules framed under S. 27, of the Legal Practitioners' Act. We are therefore unable to concur in the contrary view taken by the Allahabad and the Calcutta High Courts (cf. *Razi-ud-din v. Karim Bakhsh*,<sup>1</sup> *Sarat Chunder Roy Chowdhry v. Chundra Kanta Roy*.<sup>2</sup>)

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The policy of Ss. 28, 29 and 30 of the Legal Practitioners' Act (corresponding to Ss. 4, 9 and 6 of the English Attorneys and Solicitors Act 33 and 34 Vic. C. 28) is that whenever an agreement is entered into between a pleader and his client respecting his remuneration or payment for out-fees, such agreement should be reduced to writing and not only so but also filed in court and that when a suit is brought upon such agreement, the court should have the power—if in its opinion the agreement is not fair and reasonable—to reduce the amount payable thereunder or order it to be cancelled, and in the latter case, to award such amount only as would have been decreed in the absence of any agreement between the pleader and client. S. 30, however, provides that a pleader shall not be entitled to claim anything beyond the terms of such agreements, except in respect of services, fees, charges or disbursements expressly excepted from the agreement.

It seems therefore clear that though an agreement entered into will be invalid unless reduced to writing and filed in court, yet the pleader is not disentitled in the absence of any agreement to claim reasonable remuneration in respect of his professional services or the repayment of out-fees advanced by him. This is the view taken in the decision of that court in *Rama v. Kunji*<sup>3</sup> in regard to a claim for pleader's fee, and the decision will be equally applicable to a claim for outfees. The circumstance, however, that there was, in fact, an oral agreement or a written agreement which was not filed in court, cannot, in our opinion, make any difference, and the pleader's rights and remedies will be just the same as if there

1. I. L. R., 12 A. 169.

2. I. L. R., 25 C. 805.

3. I. L. R., 9 M. 375.



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had been no agreement at all. An oral agreement or written agreement not filed in court, being invalid under S. 28 of the Legal Practitioners' Act and therefore unenforceable is 'void' (*vide* S. 2) clause (g) of the Indian Contract Act) and cannot, therefore, preclude the pleader from maintaining a suit as if no agreement had been entered into at all. This is in accordance with the opinion expressed by this court in *Krishnasami v. Kesava*<sup>1</sup>.

The conclusion, we, therefore, come to, is that the Legal Practitioners' Act does not enact that no claim by a pleader for professional services rendered or for recovery of out-fees (advanced) shall be sustainable, unless an agreement in writing for the same has been entered into with the client and filed in court, but only that an agreement and, if any, in respect thereto shall be void unless the same has been reduced to writing and filed in court.

The promissory note (Exhibit I) is therefore void and it hence becomes unnecessary to consider whether the lien which the respondent would otherwise have had (under S. 217 of the Indian Contract Act) should be regarded as having been waived by his taking a promissory note, if the same had been filed in court under S. 28 of the Legal Practitioners' Act.

Independently of the promissory note, the respondent is entitled to recover the out-fees advanced by him and under S. 217 of the Indian Contract Act, he is entitled to retain the same out of the sums received by him to the credit of his client. The appellant's pleader admits that the amount actually advanced by the respondent for out-fees, was Rs. 200 and it is therefore unnecessary to remit an issue for the purpose of taking an account as to the sums actually advanced by the respondent for out-fees.

The second appeal, therefore, fails and is dismissed with costs.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Boddam and Mr. Justice Bhashyam Aiyangar.

Govindasami Solinga Thevan	...	...	Appellant*
v.			(Plaintiff).
Gopalasami Sivaji Mohithei and another	...	...	Respondents
			(Defendants).

*Civil Procedure Code, S. 13, Expl. II—Res-judicata—Defendant having no interest—No decree against such person—Finding no res-judicata.*

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thei.

Where a person who is not interested in the subject-matter of a suit is made a defendant, a judgment in that suit cannot be used as *res-judicata* in a subsequent suit between the said person and the plaintiff in that suit.

Where as a matter of fact the decree in the former suit (brought against three brothers) directed delivery of possession in the hands of two brothers, though upon the ground that there was no partition between the brothers the decree is not against the other brother, who could not, therefore, have appealed against such a decree.

*Rajah Run Bahadoor Singh v. Mussumut Lachoo Koer*<sup>1</sup> followed.

The finding in such suit that there was no partition is not *res-judicata* in a subsequent suit brought by the other brother for a declaration that the properties in his possession and not included in the former suit are his exclusive properties having fallen to him as his share in a partition.

Explanation II to S. 13, C.P.C., can have application only when the matter urged in the subsequent suit could have formed a defence to the first suit.

Second appeal from the decree of the Subordinate Judge's Court of Kumbakonam in A. S. No. 1088 of 1900 presented against the decree of the Court of the District Munsif of Tiruvadi in O. S. No. 254 of 1899.

In execution of a decree against one of four brothers the decree-holder attached certain specified properties and after purchasing the same himself brought a suit for recovery of the same. His ground of action was that his judgment-debtor was the manager, and that the decree debt was binding on the whole family. In the course of that suit, however, he gave up that claim and set up that the properties were the self-acquisitions of his judgment-debtor. The present plaintiff who was one of the brothers not being interested in the properties included in that suit did not appear. The other two set up a partition and claimed the properties as having fallen to their share. One of the issues was whether the brothers were divided. It was held that they were not divided

\* S. A. No. 112 of 1902.

9th September 1903.

1. L. R., 12 I. A. 23 at p. 34.

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Thevan  
v.  
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Sivaji Mohi-  
thai.

and a decree was passed in favor of the purchaser for a fourth of the properties in the hands of the other two brothers. The first-mentioned decree not being fully satisfied, the decree-holder attached other properties in the hands of the present plaintiff who was *ex parte* in the former suit and purchased them also. The plaintiff brought the present suit for a declaration that the properties exclusively belong to him having fallen in a division in his family.

*P. S. Sivaswami Aiyar* and *T. R. Venkatarama Sastri* for appellant.

*V. Krishnaswami Aiyar* for respondent.

The Court delivered the following

JUDGMENT :—The 1st respondent as the holder of a decree for money in O. S. No. 237 of 1886 against one Rajagopalasami, the step-brother of the appellant, and his two younger brothers, attached the three items of property mentioned in the plaint and purchased the same in Court sale. The appellant has brought this suit to obtain a declaration that he is solely entitled to the property and that his step-brother the judgment-debtor has no right, title or interest therein. He relies upon the decrees in O. S. Nos. 193 and 142 of 1890 and O. S. Nos. 146 and 147 of 1889 as *res-judicata* in his favour. The respondents (the 2nd respondent being the undivided brother of the 1st respondent) denying the exclusive title of the appellant, apparently contended that Rajagopalasami and his step-brothers were not divided, that they (the respondents) as purchasers in execution of the decree in O. S. No. 237 of 1886 against Rajagopalasami acquired his one-fourth share in the plaint items and that so far as item No. 3 was concerned the question was *res-judicata* in their favour by the decree in O. S. No. 17 of 1888. The District Munsif gave judgment in favour of the plaintiff as prayed for, holding that the decree in O. S. No. 142 of 1890 operated as *res judicata* against the respondents and that the respondents did not make any attempt to sustain their plea of *res-judicata* as regards item No. 3 by producing the decree in O. S. No. 17 of 1888. He also recorded a finding on the merits that by reason of the various intricate transactions relied on by the appellant he had become separated in interest both from his step-brother (Rajagopalasami), and from his two uterine brothers

and the exclusive owner of the plaint items. The Subordinate Judge, on appeal reversed the decree of the Munsif and dismissed the plaintiff's suit, on the ground that the decree in O.S. No. 346 of 1892 (Exhibit I) operated as *res-judicata* against him. The only question which we have now to consider in this second appeal is whether the view taken by the Subordinate Judge as to the effect of the decree in O. S. No. 346 of 1892 is correct. We are clearly of opinion that the view taken by the Subordinate Judge is unsound in law and the appeal should be remanded for disposal on the merits. It is noteworthy that the respondents did not either in their written statement or at the settlement of issues, plead the decree in O. S. No. 346 of 1892 in bar of the suit, though they pleaded the decree in O. S. No. 17 of 1888, in bar of the suit, so far as it related to item No. 3. Nor has the decree in O. S. No. 346 of 1892 been produced.

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They raised this plea for the first time in their memorandum of appeal to the lower appellate Court and the Subordinate Judge relying only upon the judgment which was filed as Exhibit I sustained the plea. It appears from Exhibit I that the 1st respondent purchased the items of property which were the subject matter of that suit, in execution of his decree in O. S. No. 237 of 1886 against Rajagopalasami and on the ground that he was obstructed when he proceeded to cultivate those lands, sought to establish his title to the same. The defendants Nos. 2 to 5 in that suit (No. 346 of 1892) were respectively the present appellant, his uterine brothers and the widow of their step-brother Rajagopalasami. The 2nd defendant (the present appellant) did not however appear and defend the suit, though he appears to have been examined as a witness in the case, apparently on behalf of his uterine brothers defendants 3 and 4 therein and his evidence then given was substantially the same as the averments made by him in the plaint in the present suit which relates to items of property not comprised in that suit. The title of the 1st respondent as alleged in the plaint in that suit was that Rajagopalasami, the judgment-debtor in O. S. No. 237 of 1886, was the managing member of the undivided family consisting of himself and his three step-brothers, that the decree-debt was one that was binding upon the whole family and that he had therefore acquired the interest of the whole family in the items of property sold in execution of the decree. The 3rd and 4th defend-

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ants therein claimed most of the items as their separate property by reason of their having become separated both from Rajagopalasami and from their elder (uterine) brother (the 2nd defendant) in virtue of the various transactions set up by the plaintiff in this suit. The 5th defendant claimed the remaining items as her stridhanam property. At the commencement of the trial (in O. S. No. 346 of 1892), the pleader for the plaintiff therein (1st respondent) made a statement abandoning the claim which he had made in the plaint on the footing that the properties purchased by him were joint family properties and based his claim on the footing that the properties there in question were the self-acquisition of Rajagopalasami made even during the life-time of his father. The District Munsif found that the properties were not the self-acquisition of Rajagopalasami but with reference to the defence raised by the 3rd and 4th defendants he found in paragraph 11 of his judgment as follows :—" On the question of division I find against the defendants 3 and 4."

In dealing with the question of stridhanam raised by the 5th defendant he found that that question was *res-judicata* in her favour and in paragraph 13 of his judgment he found that the plaintiff therein was entitled to a one-fourth share of the properties in the possession of defendants 3 and 4. " The properties comprised in Exhibit VI being the joint properties of all the brothers, it will thus be seen that the finding of non-division is expressed to be only between the then plaintiff on the one hand and the then defendants 3 and 4 on the other hand, and the decretal portion of the judgment (paragraph 16) was for the recovery of one-fourth of the properties in the possession of defendants 3 and 4 and the suit was dismissed in other respects. No doubt that finding was based upon his view that the properties comprised in Exhibit VI which relate both to the properties comprised in that suit and to the properties comprised in the present suit were the joint properties of all the brothers. The simple question therefore now is whether notwithstanding that the finding is recorded and the decree was only as against defendants 3 and 4 (who claimed the properties comprised in that suit as their exclusive property) it should be held that the reasoning of the District Munsif that the properties comprised in Exhibit VI are the joint properties of all the brothers is *res-judicata* in the present suit against the respondent who according to the

cause of action upon which the present suit is based and the evidence given by him in the former suit had no interest whatever in the properties which were the subject-matter of that suit and which he therefore did not take the trouble of defending. His case is that in respect of a portion of the properties comprised in Exhibit VI he became separate from his uterine brothers by virtue of a subsequent transaction and that the plaint items are included in such portion. The decree in the former case was not against him and it is clear that he could not have appealed against it. *Rajah Row Bahadoor Singh v. Massumat Lachoo Koer*<sup>1</sup>. Further within the meaning of Explanation 2 to S. 13, Civil Procedure Code, he could not have raised the matter on which the present plaint is founded as a ground of defence in the former suit for the simple reason that it would have been no defence at all to that suit so far as his interests were concerned (which were nil) in the properties for the recovery of which that suit was brought. It is, therefore, clear under explanation 2 that the "matter" of the present suit could not be deemed to have been a "matter directly and substantially in issue in such suit" between the parties to this suit. It is therefore unnecessary to refer to the various cases cited in argument on both sides.

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thei.

We must therefore reverse the decree of the Subordinate Judge and remand the appeal for disposal according to law. The costs of this second appeal will be costs in the cause.

#### IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Boddam and Mr. Justice Bhashyam Aiyangar.

Pundi Doraisami Tever ... Appellant\* (*Plaintiff*.)

v.

Lakshmanan Chetty and another ... Respondents (*1st and 3rd Defendants*).

*Promissory note, how for a payment—Covenant to pay by Vendee to Vendor's creditor—Delay in payment—Execution of Pronote by Vendor to creditor—Suit by Vendor for breach of covenant.*

Doraisami  
Tever  
v.  
Lakshmanan  
Chetty.

Where a vendee fails to pay the purchase money to the creditor of the vendor in pursuance of a covenant in the deed of sale, but paid the same a year after the sale, a suit by the vendor against the vendee for breach of covenant is not sustainable without proof of damage.

The mere execution by the vendor of a pro-note for interest due to the creditor subsequent to the sale without actual payment is not proof of such damage.

\*S. A. No. 972 of 1901.

6th March 1903.

1. L. R. 12 I. A. at 34.

Doraigami  
Tever  
v.  
Lakshmanan  
Chetty.

Second appeal from the decree of the District Court of Madura in A. S. No. 323 of 1900, presented against the Decree of the Court of the District Munsif of Paramakudi in O. S. No. 447 of 1899.

A vendee of property stipulated with the vendor that he would pay the purchase money to a creditor of the vendor. The sale deed contained a recital of an absolute discharge, *i. e.*, that the purchase money had been received by the vendor. The vendee failed to pay the money to the creditor at once, but paid it a year after the date of sale. The creditor demanded interest for the intervening period from the vendor and obtained a pro-note from him for the interest due to him. The vendor before paying the amount of the pro-note brought a suit against the vendee for damages, basing his cause of action on his execution of the pro-note.

*T. Rangaramanujachariar* for appellant.

*M. R. Ramakrishna Aiyar* for respondents.

The Court delivered the following

**JUDGMENT** :—Assuming without deciding that the defendant was bound to pay to the mortgagor, on the date of sale the amount of mortgage money subject to which the sale was made and that notwithstanding the absolute release given by the mortgagor to the defendant on the 4th July—the date of payment of the mortgage amount—the plaintiff was bound to pay the mortgagor the interest between the date of sale and the 4th July following—not paid by the defendant—this suit for damages for breach of defendants covenant to pay the mortgage amount to the mortgagor on the date of sale cannot be sustained. The plaintiff does not aver in the plaint that he paid such interest but only that he gave promissory notes for the interest to the mortgagor which as his first witness says were “purposely got executed and taken with a view that they may be required if litigation arises” and he has therefore suffered no damage at the date of the suit by reason of the alleged breach of covenant by the 1st defendant which would enable him to succeed in this action (see Judgment in S. A. No. 1253 of 1900<sup>1</sup>). We, therefore, dismiss the appeal with costs and affirm the decision appealed from on the ground that the plaint does not disclose a cause of action for the recovery of damages.

1. Since reported as *Putti Narayanamurthi Aiyar v. Marimuthu Pillai*, I. L. R., 26 M. 322.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Venkatasubbiah and another	...	...	Appellants*
	v.		(Plaintiffs).
Pichamma and others	...	...	Respondents
			(Defendants).

*Limitation Act, S. 14—Properties beyond pecuniary jurisdiction of first Court—Person Venkatasubbiah not entitled added as co-plaintiff in first suit—Same cause of action—Same parties.*

Pichamma.

Where two plaintiffs as next heirs of the last male-owner brought a suit in the District Munsif's Court for the recovery of certain properties and a third person who, however, was subsequently found to have no real claim was added on that third person's application as a co-plaintiff and on its being found that the value of the properties was beyond the pecuniary jurisdiction of the District Munsif the plaintiffs withdrew a portion of the claim, but the final order was that the plaint should be returned to the proper court.

- Held*, (1) that a subsequent suit by the two plaintiffs for recovery of the properties including the properties withdrawn in the course of the first suit was founded upon the same cause of action;
- (2) that such subsequent suit was between the same parties notwithstanding the fact that a third person who, however, was found to have no real claim was added as a co-plaintiff in the first suit on his application; and
- (3) that the plaintiffs were entitled under S. 14 of the Limitation Act to a deduction of the time occupied in prosecuting the first suit.

Second Appeal from the decree of the District Court of Nellore in A. S. No. 494 of 1898 presented against the decree of the Subordinate Judge's Court of Nellore in O. S. No. 99 of 1897.

In 1889, two persons brought a suit in the District Munsif's Court to recover certain properties as reversioners to a widow who died in 1879. A third person claimed as being jointly entitled with them and was added as plaintiff. The defendants objected to the valuation of the suit. The Commissioner who was appointed to ascertain the valuation reported that the properties were undervalued and the proper valuation took the case out of the jurisdiction of the court. The District Munsif directed the return of the plaint for presentation to the proper court. This was in March 1890. In April the two plaintiffs who originally instituted the suit gave up some items in order to bring it

\* S. A. No. 840 of 1900.

25th March 1903.



Venkatasub-  
biah  
v.  
Pichamma.

within the jurisdiction of the court and asked the Munsif to retain the plaint on his file and proceed to hear the case in respect of the other items. The District Munsif gave a decree in favour of the original plaintiffs, holding that the additional plaintiff was not entitled to a decree. The defendants appealed, one of their contentions being that the plaintiffs ought not to have been allowed to relinquish items after the institution of the suit in order to give jurisdiction to the court. The District Judge allowed this contention and directed the plaint to be returned for presentation to the proper court. This was in August 1894, and this suit was filed soon after in the Subordinate Court of Nellore including in the claim the items given up subsequently before the District Munsif in the first suit.

The defendant's contention was that the plaintiffs were not entitled to any deduction of time spent in prosecuting the previous suit and that the present suit was, therefore, barred.

*T. V. Seshagiri Aiyar* for appellants.

*P. R. Sundara Aiyar* and *P. Nagabhushanam* for respondents.

The Court delivered the following

**JUDGMENT** :—We are clearly of opinion that the decision of the lower appellate Court is erroneous as regards limitation, and that the suit is saved from the bar of limitation by S. 14 of the Limitation Act. The former suit in the Ongole District Munsif's Court comprised all the items of property involved in the present suit. The two plaintiffs who prosecute the present suit are the only plaintiffs who instituted the former suit, though on application made by the son of a deceased reversionary heir of parallel grade with the plaintiffs, he was joined as a co-plaintiff. The defendants having objected to the jurisdiction of the Ongole District Munsif, a Commissioner was appointed to value the lands, and in the result it was held that the value of the suit exceeded the jurisdiction of the District Munsif, and the District Munsif, therefore, ordered the plaint to be returned. Within a few days of this order the present plaintiff presented a petition to the District Munsif offering to withdraw their claim to items Nos. 6 and 7 and half of No. 8, so as to bring the suit within the jurisdiction of the District Munsif and thus save them the expense of going to another court. The District Munsif allowed this to be done, and trying the suit on the merits gave a decree in favour of the present

plaintiffs holding that the additional plaintiff's father predeceased the widow. Venkatasub-  
biah  
v.  
Pichamma.

All the defendants who were joined in the suit were interested in the remaining items of the property. The principal defendants (1 and 2) appealed against the District Munsif's decree, contending that it was not competent to the District Munsif to allow the plaintiffs to prosecute the suit only in respect of so much of the plaint property as would be in value within the jurisdiction of the District Munsif and that in law the suit should be regarded as one comprising the whole of the property originally claimed and this contention prevailed and the District Judge returned the plaint which was then presented to the Subordinate Judge including also the items 6, 7, and half of 8, omitted in order to bring the case within the jurisdiction of the District Munsif.

We may here add that the additional plaintiff, whose claim was disallowed by the District Munsif, did not prefer an appeal against the dismissal of the suit so far as he was concerned and though the defendants in the present suit set up this claim by pleading that the present plaintiffs alone could not prosecute the claim, it was found in this suit also that he had no claim. The present suit therefore is founded on the same cause of action and is between the same parties within the meaning of S. 14, and the fact that a person who, it is found now also, has no real claim, was joined as a co plaintiff in a former suit on his own application does not make the present suit one between parties different from those in the former suit. According to the decision of the Appellate Court in the former suit, obtained on the contention of the present respondents, it must be taken that the items comprised in the present suit were all comprised in the former suit, as otherwise the former suit could not have been dismissed on the ground that it was beyond the jurisdiction of the District Munsif. The suit therefore is not barred in respect of all or any of the items. Both the courts found for the plaintiffs on the merits. We must therefore set aside the decree of the lower appellate Court and restore that of the Subordinate Judge with the modification that items Nos. 6, 7 and the portion of No. 8, that were disallowed will also be decreed to the plaintiffs with mesue profits in respect of those items also from date of decree, and with costs throughout.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Chief Justice*,  
Mr. Justice Bhashyam Aiyangar and Mr. Justice Moore.

Vengun Poosari and another	...	...	Appellants*
	<i>v.</i>		( <i>Plaintiffs</i> ).
Chinnu <i>alias</i> Patchamuthu	...	...	Respondent
			( <i>Defendant</i> ).

Vengun Poosari  
v.  
Patchamuthu.

*Specific relief Act, S. 42—Maintainability of suit—Right of pujari to use articles for worship and to access—Injunction—Failure to ask for possession.*

Where a person has only a right of access to a certain house and the use of certain articles kept therein for the purpose of performing worship in a certain temple he need not sue for possession. A suit by him for a permanent injunction under the circumstances is maintainable and will not be barred by his failure to claim possession.

Appeal under S. 15 of the Letters Patent against the judgment of Mr. Justice Subrahmaniya Aiyar in S. A. No. 993 of 1901, dated 26th November 1902, preferred against the decree in A. S. No. 157 of 1900 on the file of the District Court of Coimbatore.

The plaintiffs alleging that they were entitled as pujaris to do puja for Semmuniswami in Pujariyoor in Pattuloor village in Havani Taluq, brought this suit against the defendant for an injunction restraining him from causing obstruction to the performance of the puja by the plaintiffs in the temple of the said Semmuniswami and to pass a decree directing the defendant to open the doors of the temple house locked by the defendant in which the temple properties and images were placed. The case was that the plaintiffs were performing puja, that they locked the door of the temple house aforesaid but the defendant put another lock upon it and finally broke open the padlocks placed by both parties when he found that the Magistrate referred the plaintiffs to a civil suit. The defendant contended *inter alia* that the suit was not sustainable by failure on the part of the plaintiffs to ask for possession. The District Munsif gave the plaintiffs a decree, but in appeal the District Judge reversed it on the ground that the suit was opposed to S. 42 Specific Relief Act. On second

\* L. P. A. No. 2 of 1903.

13th July 1903.

appeal to the High Court their Lordships (Subramania Aiyar and Vengan Poo-sari Davies, JJ.) differed in opinion and delivered the following

JUDGMENTS :—SUBRAHMANIA AIYAR, J. :—This is not a suit for the establishment of the first plaintiff's right to the office of Poojari. The claim herein is distinctly limited to a building called Semmuniswamy temple situated within the boundaries set forth in the plaint, and certain articles contained therein. The defendant *inter alia* contended that the property was not in the plaintiff's possession but in that of the defendant, and it was with reference to this contention that the 4th issue was framed, viz., "Whether plaintiffs are in possession of the plaint temple and the room and articles mentioned in plaint item No. 2? Can they sue for mere injunction."

While finding upon the evidence that the plaintiffs had been prevented from having access to the place from 1895, and that the place was locked up by the defendant and continued so ever since, the District Munsif was of opinion that as prior thereto pooja had been performed by the 2nd plaintiff, possession should be presumed to be still with the plaintiffs. But the District Judge took a different view and I take the effect of his finding to be that the plaintiffs are out of possession, and that the defendant is in possession. Indeed it being admitted that from a time at least 4 years before the plaint the plaintiffs had been prevented from having access to the temple and that the defendant has had it under his lock and key ever since, it is not easy to see how any other conclusion can be arrived at. It would follow from some of the allegations in the plaint, that the case of the 1st plaintiff is that he is exclusively entitled to the buildings, etc. Assuming that his right is not larger than that of Mallakkal, his alleged adoptive mother, it is clear from para. 6 of Exhibit E, the judgment of the District Court in the litigation of 1881—1882, that he and the defendant are entitled to joint possession of the temple etc.

The question therefore is whether a party in the position of the plaintiff can sue for a perpetual injunction.

The observations advisedly made by *Handley* and *Weir*, JJ., in *Kanakasabai v. Muttu*<sup>1</sup> cited for the respondent, are clearly

1. I. L. R., 13 M. 445.

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—  
Subrahmania  
Aiyar, J.

against such a suit. (See also *Abdulkadar v. Mahomed*). Many of the English authorities which would throw light on questions like the present were reviewed and fully examined by *Kindersley*, V. C. in *Lowndes v. Bettle*<sup>2</sup>. The result of the authorities as briefly expressed in *Kerr on Injunctions* (3rd Edition, page 111) is that "Where a plaintiff is out of possession, the court will refuse to interfere by granting an injunction unless there be fraud or collusion or unless the acts perpetrated or threatened to be perpetrated are so injurious as to tend to the destruction of the estate." It is scarcely necessary to say that the refusal on the part of courts of Equity to interfere by way of injunction in such cases is on the ground that the plaintiff, having an adequate remedy at law must pursue it. It must be added that, even in the exceptional cases mentioned in the passage just quoted, the plaintiff must satisfy the court that there is an action pending at law between him and the defendant which will try the right as between them. (*Kerr on Injunctions*, p. 111.) Further even where there is no question of ouster, a mandatory injunction will not issue against a trespasser whose act is complete. Thus in *Deere v. Guest*<sup>3</sup>, where the defendants had completed the construction of a railway on the plaintiff's land before suit and claimed only a right of way, Lord Cottenham dismissed the bill for an injunction observing, "The thing complained of has been done; the tram road has, with the leave of the tenant in possession, been completed and the court is asked by the bill to restrain the defendants, who, having finished the undertaking, are now in the daily use and occupation of it, from continuing so to use it and from interrupting the servants and workmen of the plaintiffs in their attempt to destroy it; in other words, the court is virtually asked to eject the defendants and authorize the plaintiffs themselves to take possession of the tramroad. The case originally may have been a case of waste occasioned by the cutting of the tramroad and the laying of the iron rails over the plaintiff's land; but what is now claimed by the defendants is simply a right of way and if they are not entitled to that right they are mere trespassers and the plaintiffs have their proper legal remedy against them as such."<sup>4</sup> In *Moreland v. Richardson*<sup>5</sup> Sir John Romilly, M. R., expressed his concurrence

1. I. L. R., 15 M. 15.

2. 33 L. J. (Ch.) 451.

3. 1 Myl. & Cr. p. 516.

4. *Ibid* 522.

5. 22 Beav. 596 at p. 604; S. C. 25 L. J. Ch. 883.

with the view laid down in *Deere v. Guest*<sup>1</sup> and observed that no injunction would be granted if the trespass were complete and perfect, however clear the original right might be. No doubt in *Goodson v. Richardson*<sup>2</sup> Lord Selbourne and Lord Justice James apparently attach to the facts in *Deere v. Guest*<sup>1</sup> an effect somewhat different from that attributed to them by Lord Cottenham, as they both thought that the possession was with the defendant Guest, but the reasons assigned by them for considering that the injunction was rightly refused by Lord Cottenham go only to support the view of the law as stated in the passage quoted from there; for, according to the judgments of those learned Judges no bill for an injunction would lie against a defendant in possession in the absence of any impediment to the institution of an action of ejectment or any equitable circumstances which would induce Chancery to assume jurisdiction. I have only to add that to allow a plaintiff in this country who is entitled to ask for possession to ask for an injunction only instead, would be to enable him to evade the provisions of the law as to the proper tribunal to try the right, and, as to the court fees payable in suits for possession. The opinion expressed in *Kanakasabai v. Muttu*<sup>3</sup> seems, therefore, to be correct as a general rule, and as there is no question in the present instance of fraud, irreparable damage, continuing trespass or other equitable grounds warranting the issue of an injunction and as the case is clearly one where the plaintiffs ought to sue for such possession as they are entitled to, it is not a proper case for the grant of the injunction sought. On these grounds, I come to the conclusion that the appellate decree of the lower appellate Court dismissing the plaintiff's suit should be sustained and I would dismiss this appeal with costs

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muthu.  
—  
Subrahmanya  
Aiyar, J.

DAVIES, J.:—The 1st plaintiff claiming as the adopted son of one Vengan Pujari sues the defendant, a dayadi of his adoptive father, for a permanent injunction restraining the defendant from obstructing him in the performance of poojah in a certain temple and from preventing him having free access to the room where the temple property is kept. The 1st plaintiff's adoptive father's widow, Mallakkal obtained a declaration of her right to perform the poojah and restraining the defendant from preventing her

1. 1 Myl. & Cr. p. 516.

2. L. R., 9 Ch. Ap. 221.

3. I. L. R., 13 M. 445.

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muthu.  
—  
Davies, J.

access to the room where the temple property was kept in A. S. No. 51 of 1882 on the file of the District Court of Coimbatore, and the Munsiff finding the 1st plaintiff to be Mallakkal's adopted son has, in pursuance of that decree, decreed the present suit as prayed. The Judge has however dismissed the suit on the ground that the 1st plaintiff should also have sued for the possession of the temple properties as well as for the possession of the office of Pujari, but in my opinion it was unnecessary for the plaintiff to sue for such possession, especially as in the previous suit a similar objection was not allowed although it appears to have been raised. The 1st plaintiff's right to the possession of the office of Pujari was declared in the previous suit and he is therefore entitled to an injunction restraining the defendant from interfering with that right. The District Judge considers that the order of the joint Magistrate purporting to be passed under §. 145 of the Criminal Procedure Code declaring the defendant to be in actual possession of the right of performing poojah necessitates the 1st plaintiff's suing for that possession, but the order of the joint Magistrate is void and of no effect for it is clearly *ultra vires*, the Magistracy having no jurisdiction in disputes relating to the possession of an office. Their jurisdiction is limited to disputes concerning "land or water or the boundaries thereof"; so that the 1st plaintiff not being bound by this order is not bound to sue for possession of the office to which his right has already been declared. As to the possession of the properties necessary to the performance of poojah it seems to me that the first plaintiff's right to perform the poojah carries with it the right to have the use of all the accessories necessary for such performance such as the right of entry into the temple and the possession for the time being of the vessels and paraphernalia appurtenant to the worship. So that if the 1st plaintiff is the heir of Mallakkal or her husband, I think he is entitled to the decree which the Munsif gave him, and that the case should be remanded to the District Judge for decision on this point.

This second appeal is dismissed with costs under S. 575 of the Civil Procedure Code.

Thereupon an appeal was preferred under the Letters Patent.

*C. R. Tiruvenkatachari* for appellants.

*T. Pattabhirama Aiyar* for respondent.

The Court delivered the following

**JUDGMENT:**—In this case we are of opinion that, on the allegations in the plaint, a suit for permanent injunction is maintainable. The plaintiff does not claim a right of possession in the legal sense of the term, either exclusive or joint, in the temple No. 1 or in the house No. 2, nor do the allegations in the plaint show that he is entitled to such possession. His case, as disclosed in the plaint, is that he has a right of access to house No. 2, and the use of certain articles kept therein for the purpose of performing worship in temple No. 1 and house No. 2.

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muthu.

The finding of the Lower Appellate Court that the suit is not maintainable is based on a misconception of the legal effect of the order of the Joint Magistrate which purports to have been made under S. 145 of the Code of Criminal Procedure. For the reasons pointed out by *Davies, J.* the order in question appears upon the face of it to have been made without jurisdiction, and it does not declare the defendant's possession of the building. Seeing that the plaintiff lays no claim to possession and neither his own allegations in the plaint in the suit, nor the decree in the former suit on which he relies disclose any title to possession, it is immaterial whether the defendant was or was not in possession at the date of the institution of the present suit. It is unnecessary for us in second appeal to decide, whether, if the plaintiff's title by adoption be established, he is entitled to the decree which the Munsif gave him. This question and the other questions arising in the appeal must be decided by the Lower Appellate Court.

We accordingly reverse the decision of the Lower Appellate Court and remand the case to that Court for disposal according to law. Costs of the second appeal and of this Letters Patent Appeal will abide the event.

#### IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmaniam Aiyar and Mr. Justice Boddam.

Krishnamurthi Aiyar ... Appellant\* (*Judgt.-debtor*).  
v.

Narayanasawmy Aiyar ... Respondent (*Decree-holder*).

S. 244, Civil Procedure Code—Order in execution—Illegal acts done in executing order  
—Question in execution—Breaking open almyrah—Jewels taken but not mentioned in attachment-list.

Krishna-  
murthi Aiyar  
v.  
Narayana-  
sawmy Aiyar.

A claim by a judgment-debtor that the decree-holder in executing his decree by attachment of the former's moveable property caused certain almirahs to be broken



Krishna-  
murthi Aiyar  
v.  
Narayana-  
sawmy Aiyar.

and took away jewels without mentioning the same in the attachment-list and without crediting the same for the decretal amount is one falling under S. 244, Civil Procedure Code, and must be determined only by the court executing the decree.

Appeal from the order of the Subordinate Judge's Court of Negapatam, dated 24th November 1902, in M. P. No. 701 of 1902 (O. S. No. 42 of 1899).

One Narayanasamy Aiyar obtained a decree against the appellant and obtained an order in execution that the latter's house should be broken open and that moveable properties of the judgment-debtor in such house be attached in execution of the decree. The appellant alleged that under color of this order things attached to the earth (or house) were removed and attached, and that jewels in his house were taken away by the decree-holder without being credited to the decree, and he filed a petition asking that the value of the said jewels might be credited in payment of the decree. The Sub-Judge held that no petition lay under S. 244, Civil Procedure Code, and that the appellant's remedy was only by suit. Hence this appeal.

*T. V. Seshagiri Aiyar* for appellant.

*T. R. Venkatarama Sastriar* for *P. S. Sivaswami Aiyar* for respondent.

The Court delivered the following

**JUDGMENT** :—It is obvious that the petitioner alleges that the acts complained of were improperly done by the counter-petitioner and the claim in execution of the decree by attachment of moveable properties in supposed pursuance of an order of the court.

We are clear that these allegations raise questions relating to the execution of the decree and are to be enquired into under S. 244 of the Civil Procedure Code and not by separate suit.

We therefore allow the appeal, set aside the order of the Subordinate Judge, and direct that he do take the petition on his file and dispose of it according to law.

The costs will abide the event.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar and Mr. Justice Boddam.

Vedanayaga Mudaliar... Appellant\* (*Plaintiff*).

v.

Vedammal ... Respondent (*Defendant*).

*Hindu Law—Succession—Right of murderer to succeed as heir of the person murdered—Exclusion—Justice, equity and good conscience—"Nemo ex suo delicto meliorem suam conditionem facere potest"—Specific Relief Act, S. 42—Suit for declaration—Contempt of Court.*

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Vedammal.

The sin attaching to the commission of serious crimes such as robbery, murder &c., does not entail of itself forfeiture of civil rights, under the Hindu Law.

The text of Yajñawalkya providing for inheritance to the separate property of a person (vs. 135, 136) is subject to the rules as to disqualification contained in later texts.

The text purporting to exclude from the succession a son "hostile to the father" must be regarded as obsolete.

Although there is nothing in any express text of Hindu Law disqualifying a murderer or other person privy to the murder from succeeding to the person who was the victim of murder, the maxim "*Nemo ex suo delicto meliorem suam conditionem facere potest*" according to which the wrongful act (murder) committed by a person standing in the position of heir disentitles him to any beneficial interest in the inheritance is one of universal application and ought to be followed in British India as a rule of justice, equity and good conscience.

A mother murdering her son is not beneficially entitled to take his estate by inheritance.

The fact of her having been acquitted or convicted is not relevant in a civil court upon the question whether she has committed the wrongful act imputed to her and if so, whether by such act she has forfeited her rights of inheritance.

Where a plaintiff who was the next person entitled to succeed after the mother had been appointed in a prior suit as a receiver and an order was passed in such suit directing the plaintiff to hand over the properties to the mother, a suit by the plaintiff for setting aside the order and for declaring that on account of the mother's wrongful act he was entitled to the inheritance of her son was maintainable and was not barred by S. 42 of the Specific Relief Act.

Where the plaintiff who was directed as receiver to hand over possession to the mother subsequently brought a suit and obtained a temporary injunction restraining her (the defendant) from taking possession of her son's properties, he was not guilty of any contempt so as to disentitle him to get a declaration in his favor in such suit.

\* A. No. 88 of 1902.

12th April 1904.

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Mudaliar  
v.  
Vedammal.

Appeal from the decree of the Additional Subordinate Judge's Court, Tinnevely, in O. S. No. 10 of 1901.

*Sir V. Bhashyam Aiyangar, M. R. Ramakrishna Aiyar, P. R. Sundara Aiyar and T. Narasimha Aiyangar* for appellant.

*V. Krishnaswami Aiyar and T. V. Vaidyanatha Aiyar* for respondent.

The Court delivered the following

**JUDGMENT:**—The plaintiff, as the paternal aunt's son or *bandhu* of the deceased Sankaramoorti Mudaliyar, sues for a declaration of his right to the property left by the deceased, on the ground that the defendant, the deceased's mother, is not entitled to the property, she having been a party to his murder, but that the plaintiff, as the next in succession, is the person that has the right thereto. The defendant and a Muhammadan by name Shaik Abdul Kadir Ravuthan, with whom she is alleged to have been criminally intimate prior to the death of her son, were tried for the murder in the Sessions Court of Tinnevely. She was, however, acquitted while her alleged paramour was convicted of the offence.

The Subordinate Judge, without trying the question whether the defendant was concerned in the murder, dismissed the suit.

The first question for consideration is whether the plaintiff can ask for mere declaration; and if so, whether, as urged for the defendant, the Court should, in the circumstances to be referred to, refuse the relief prayed for. Now as to the first point. Prior to the death of Sankaramoorti, he having been a minor, proceedings regarding the appointment of a guardian for him had been taken under the Guardian and Wards Act. Pending those proceedings, the District Court of Tinnevely appointed the plaintiff as Receiver and put him in actual possession of the properties of the minor, removing the defendant from the charge thereof. This Court held that the District Court had no power to appoint a Receiver in the course of the guardianship proceedings, and directed that possession of the property should be handed back to the defendant. This order for re-delivery to the defendant was no doubt passed subsequent to the death of her son, but it had not been carried out to any extent at the date of the suit.

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Vedammal.

Consequently the possession of the property was, at the time, neither with the defendant, nor with the plaintiff, the property having been in *custodia legis* and in the hands of an officer of Court, it being of course a mere accident that that officer was the plaintiff himself. The defendant not having been in possession, the plaintiff could not as against her, have claimed as consequential relief an order for delivery, and if, as alleged, he is the person entitled, nothing more was required to be done to secure to the plaintiff all his rights, than the revocation of the order of this Court referred to above directing delivery of the property to the defendant; and that would have enabled the plaintiff to retain possession in his own right. In these circumstances, it must be held that the proviso to S. 42 of the Specific Relief Act is not applicable to the case, and that the suit is not open to objection on the ground that nothing more than a mere declaration of the plaintiff's right is sought for.

As to the next point it was contended for the defendant that the plaintiff had been guilty of contempt in not obeying the order of this Court directing delivery of the property to the defendant, that such contempt remained unpurged at the date of the suit and consequently that the relief sought for should, in the proper exercise of the discretion vested in the Court, in cases like the present, be refused to him. The facts bearing upon this contention are briefly these. In an appeal preferred in connection with the guardianship proceedings the plaintiff, in his capacity of Receiver, had been made a party respondent. In that appeal, while the defendant's son was still alive the plaintiff's appointment as Receiver was set aside, but no order about the possession of the property in his charge was then made. That question came up for consideration in October 1900 and the fact of the son's death having been brought to the notice of the Court, it was ordered that possession be given to the defendant, the *prima facie* heir. Even prior to such order the defendant had moved the District Court to call upon the plaintiff to surrender possession of what was held by him as Receiver and upon notice issued in consequence of such application the plaintiff, in September 1900, delivered up to the Court all the documents and papers connected with the estate and which were in his custody, intimated to the Court that the moneys.

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realized by him had been duly lodged in the public treasury to the credit of the guardianship cause, and prayed that the security taken from him as Receiver be cancelled and discharged. But, until the 13th of March next, nothing further appears to have been done in the matter. This was doubtless due to the defendant having been implicated in the charge of her son's murder, which took place on the 25th August 1900. Having been arrested in consequence she remained in custody until the termination of the proceedings by her acquittal in the Sessions Court, which was on 11th March 1901. She thereupon moved the District Court with reference to her getting possession of the estate. On the 29th of March, however, the present suit was instituted and the plaintiff having therein prayed for an injunction restraining her from taking possession of the property the same was granted and in consequence of such injunction the District Court stayed further proceedings. In these circumstances it cannot be held that the plaintiff was in contempt. His request to the Court in September 1900 to be discharged, accompanied with the deposit of the documents and money connected with the estate, was, so far as it went, a compliance with the direction of the Court. What prevented the defendant taking possession was not any disobedience on the part of the plaintiff as Receiver, but the prohibition by the Subordinate Court issued no doubt at the instance of the plaintiff in his suit. But in asking for such a prohibition he only exercised the right of every litigant in his position, and it is impossible to treat such an application and the order thereon as a refusal by him to perform any of his duties as Receiver or to involve any contempt requiring to be purged.

The real point for our decision is, assuming the defendant was a party to the murder, whether it in any way affected her succeeding to his estate. On behalf of the plaintiff one argument was, that the commission of such a sin by a Hindu rendered the person committing it a "*patita*" or degraded person and that the degradation involved among other consequences, a loss of the right of inheritance. Acts or omissions which entailed degradation under the Hindu system of law were indeed many. They included not only heinous sins and crimes but numerous other things which are looked upon as innocent or are tolerated in these

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times. It may well admit of doubt whether the injunctions connected with degradation were ever enforced otherwise than by expulsion from caste now relieved against by legislation. However this may be it is quite certain that even so far back as the days of the Dayabhaga Commentator, Srikrishna Tarkalankara, loss of proprietary rights as an incident to degradation had begun to disappear. (See Tagore Law Lectures for 1884-85, page 426). Since the establishment of British Rule in this country, no one seems to have ventured to suggest in judicial proceedings that the sin attaching to the commission of even such serious crimes as robbery, murder &c., entailed by itself forfeiture of civil rights as a matter of Hindu Law, for though innumerable persons have from time to time been convicted by the Courts of such offences, the reports contain no case recognizing any such doctrine. Plaintiff's case, therefore, derives no support from the rules dealing with the matter of degradation which, even assuming that they were at one time more than mere moral injunctions, cannot now be treated as otherwise than obsolete.

It will next be convenient to dispose of the American cases referred to in the argument with reference to the effect of murder on the right of the murderer to take as heir or legatee of the murdered person. In *Riggs v. Palmer*<sup>1</sup> decided by the New York Court of appeals in 1889, the facts so far as they are material for the present purpose were these. One Francis B. Palmer possessed of personal and real property had made his will giving certain legacies to his two daughters and the remainder of his estate to his grandson Elmer E. Palmer with a gift over to the daughters in case Elmer should survive him and die unmarried and without issue. Elmer who knew of the provisions made in his own favour in the will, murdered the testator by poisoning him in order to prevent the testator from revoking those provisions (which he had manifested some intention to do) and in order that he might obtain the immediate possession and enjoyment of the property. A majority of the Court held that the devise and bequest to Elmer should be treated as *revoked* by reason of the crime of the devisee (notwithstanding that the statute of wills in force in the state, made no express mention of the commission of such a crime as a fact

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1. 115 N. Y. 506; 12 Am. St. R. 819.

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operating to revoke a will), that the daughters were the true owners of the real and personal estate left by the testator and restrained the administrator and Elmer from using any of the personalty or real estate for Elmer's benefit. The majority in effect held it is competent to a Court to import into a statute, on grounds of public policy, what the plain and unambiguous words of the enactment do not in any way cover. The next case was that of *Schellenburger v. Ransome*<sup>1</sup> which came before the Supreme Court of Nebraska first in 1891 and then on review three years later. There a female child of tender years was entitled to a certain estate in fee simple subject to her father's life interest. The father who, had the child died a natural death at the time she was murdered, would have been her heir, killed her in order that the fee simple might then and there vest in him as such heir. The Court in 1891 held on the analogy of *Riggs v. Palmers*<sup>2</sup> that the transferees from the murderer acquired no interest in the estate which had been owned by the deceased child, as the transferor himself had nothing to convey since one could take by inheritance the estate of a person whom he murders for the purpose of removing the life standing between him and that estate. But on the review the Court went to the opposite extreme by holding that the transferees were entitled to the estate of the murdered child notwithstanding it was found that they had taken with the knowledge that their transferor was the murderer. The last case was *In re Carpenter's Estate*<sup>3</sup> that came before the Supreme Court of Pennsylvania in 1895 and in which a majority of the Court held that a son who had murdered his father for the purpose of securing the latter's estate, nevertheless took the estate as heir under the statute of descents and distributions.

None of these rulings has, as might be expected, given entire satisfaction in that country. (See Harvard Law Review vol. IV p. 394 and vol. VIII p. 170). Notwithstanding that the Judges who took part in the second decision in *Schellenburger v. Ransome*<sup>1</sup> as well as those who formed the majority in *In re Carpenter's Estate*<sup>2</sup> felt, as they could not but do, that the conclusion reached by them was not what (was?) to be desired, they seem to have considered themselves bound to arrive at it lest otherwise they would be im-

1. 31 Neb. 61, 28 Am. St. 500.

2. 115 N. Y. 506; 12 Am. St. R. 819.

3. 50 Am. St. Rep. 765.

porting into the statutes they had to deal with, viz., the statutes relating to descent and distribution of property in force in the states respectively, exceptions which it was beyond the legitimate bounds of judicial interpretation to introduce. Whether without infringing established canons of construction of statutes, the Nebraska and the Pennsylvania Courts could not have avoided the result admitted by them to be undesirable, and whether even a more satisfactory conclusion than that arrived at by the majority of the Court in *Riggs v. Palmer*<sup>1</sup> from the point of view of those who object to the latitude claimed by that majority in the matter of interpreting written laws, by following the course suggested in the periodical already cited i. e., by fastening a trust upon the guilty party on whom the statutes cast the legal estate, is well worthy of consideration (see 4 Har. L. R., vol. 394 and 8, Har. L. R., 170).

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Be this as it may, how does the matter stand with reference to the law to be administered by this Court in cases like the present? No doubt the personal law of the parties to the dispute is the Hindu Law of Succession. If that law lays down any definite rule with reference to the question to which the facts of the present case give rise, it is of course not open to this Court to decline to enforce that rule on the ground that it would be more equitable in its opinion so to decline. If however in regard to such a question the Hindu Law is altogether silent, the rule to be applied would be that of equity, justice and good conscience. Now does the Hindu Law lay down any rule in regard to the precise point at issue viz., whether a person murdering another for the purpose of accelerating the succession to him is or is not entitled to the succession? If the well-known text of Yajnavalkya, "The wife, and the daughters also, brothers likewise, and their sons, gentiles, cognates, a pupil, and a fellow student; on failure of the first among these the next in order is indeed heir to the estate of one, who departed for heaven leaving no male issue" (Stokes Hindu Law Books p. 427), which is the foundation of the Mitakshara law of inheritance to the property of a male dying separated, is to be read as containing an explanatory clause negating every possible exception, then doubtless the defendant must succeed. That however is indisputably not the case. For take the very first instance mentioned in the text, that of the wife. Supposing she had been unchaste during

1. 115 N. Y. 506; 12 Am. St. R. 819.



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the lifetime of her husband, it cannot of course be argued that by virtue of the text she would be his heir in spite of her misconduct. Idiocy, luancy, certain incurable diseases, entry into the order of *yati* &c., are like unchastity in the case of the wife, circumstances that would in the case of those with regard to whom they are predicable preclude the operation of the rule embodied in the text. No doubt such cases are provided for by rules of Hindu Law to be found in other texts. But that does not derogate from the soundness of the view that the text under which the defendant claims enunciates but a general rule whose effect is liable to be nullified more or less by facts other than the two postulated therein, *viz.*, the demise of a male owner of property without co-parceners and the survival of the relation specified in the text. What such facts are have to be ascertained either with reference to the rules embodied in other Hindu texts or with reference to principles which it is the duty of the Court to follow as a tribunal bound to administer the law of justice equity and good conscience in cases not provided for specifically. Consequently whether the fact that a person who would be heir by virtue of that text murders him to whom he would thus be heir detracts from his right of succession is a question to be decided in the first place with reference to the provisions, if any, of the Hindu law to be found elsewhere than in that text, and in the absence of such provisions according to recognised general principle which it is legitimate for the Court to resort to in such a contingency.

In the argument addressed to us our attention was not drawn to any Hindu authority that may be said specifically or directly to bear upon the matter. Texts relating to degradation attaching to a person by reason of the sin involved in the commission of murder which is a crime of the highest degree according to the classification of Hindu Lawyers cannot, for reasons adverted to in a previous part of this judgment, avail in the discussion of this question. The text purporting to exclude from the succession a son "hostile to the father" undoubtedly shows how repugnant to the spirit of the Hindu law must be the contention that the estate of a deceased person passes to the heir who murders him, as if it were a reward for his unnatural act. But whether from the extreme generality of the expression, which has been interpreted by different commentators to include a variety of things from abuse of to murderous

attacks on the father and even what takes place after his death such as failure to offer the customary oblations, (see Jolly's *Narada*, vol. XXXIII Sacred books of the East, p. 194, Note on verse 21), or on some other ground, this text has never been acted upon and it also must be considered obsolete. Even were it otherwise, relating as the text does to the case of *father and son* there would be no warrant for treating the words importing that relation as merely illustrative and virtually comprehending all cases of heritable relations, the foundation of the rule being most probably the special reverence and regard to the father as head of the family inculcated by the Hindu Sastras.

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The point under consideration is clearly therefore one untouched by the Hindu law. Turning then to the general law how does the matter stand? The answer is absolutely plain, for the principle expressed by among others the maxim "*nemo ex suo delicto meliorem suam conditionem facere potest*" is one almost of universal law. Some of the comments of Bronchorst on this maxim in his work on the rules of the Roman law (p. 106) seem to have peculiar appositeness here. "This rule," he writes "is replete with justice and equity, for it is not agreeable to reason that any one should derive advantage from that which deserves punishment. Thus if a husband shall have agreed in the marriage articles that the dowry of the wife shall be restored to him in the event of her death and if he shall contrive to bring about that event either by destroying her or by not calling in a physician when she is sick or by fraudulently employing an unskilful one in order to hasten her death he shall not be entitled to the restitution of the dowry. For it is not agreeable to equity that the husband should thus benefit by his crime." The case dealt with in the above extract is no doubt one of contractual relation. That the application of the maxim is, however, not confined to such a relation only is manifest from the decision of the Queen's Bench in *Cleaver v. Mutual &c., Life Insurance Co.*,<sup>1</sup> where the Court refused to enforce a trust in favour of one who had brought about the conditions essential to its fulfilment by killing the person whose death made it operative. The principle of this decision has been extended in this country with reference to the legal relation of decedent and heir in the case of *Shah Khanam v. Kalhandharkhan*<sup>2</sup> where the Chief Court

1. (1902) 1 Q. B. 147.

2. Vol. I. Punjab Rep. p. 455.

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of Punjab held that a Mahomedan who had murdered his half brother could not be allowed to claim the deceased's property as his heir. This decision cannot but commend itself as right considering that the legal relation to which the maxim in question was thus in effect extended is one pre-eminently calling for such extension, implying as it does reciprocal affection and kindness attributable to the natural tie subsisting between persons so connected, and that to hold otherwise would be to outrage every feeling of humanity.

This being so, the only question is as to the proper theory of giving effect to the maxim in cases like the present, that is to say, whether the wrongful act of the person standing in the position of heir is to exclude him from the inheritance so as to prevent the very vesting in him thereof, or is it to be treated as a fact that should merely disentitle him to any beneficial interest in the inheritance. It is the latter view that would seem to be supported not merely by the analogy of the Civil Law but also by a provision of our own legislature in a not dissimilar case. It has also a practical advantage which the theory of non-vesting of the inheritance does not possess and which makes it therefore the more acceptable from the point of view of a tribunal administering both law and equity.

Now according to the Civil Law the killing of the decedent by the heir intentionally or even negligently was among the causes which rendered the heir unworthy of the inheritance. This doctrine of unworthiness was, however, not given effect to by intercepting the vesting of the inheritance itself. In Mackeldy's work to which reference was made in the course of the argument the law on the point is thus succinctly stated : "There are a number of cases in which the heirs or legatees are deprived for unworthiness of the property left to them. In these cases which are termed cases of unworthiness (indignity) the law says *heres veb legatarius Capere non potest* (the heir or legatee is incapable of taking) or *eicripitur* (wrested from)." (Dropsie's Translation of Mackeldy's Roman law p. 550). This last phrase of the learned author points to the view that in such cases what really happens is not that the vesting of the succession is prevented but that what was

vested in accordance with the law is wrested away on ground of justice and equity. And Sohm in his Institutes (p. 472) says "The unworthiness does not prevent either *delatio* or *acquisitio*. But the law declares that the property which has vested in an *indignus* shall be divested again (*eripi*) either in favour of the *fiscus* or in favour of a third party entitled (*bona ereptoria*). He is considered unworthy to *keep* the inheritance." The unmistakable clearness and directness with which the matter is stated in the passage just quoted render it superfluous to refer to other authorities, citing some of which it was pertinently pointed out in regard to the references to the civil law made in *Riggs v. Palmer*<sup>1</sup>, that *ereptio propter indignitatem* is a case not of revocation but of restitution. (8 Harv. L. Rev. 170).

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The provision of the legislature alluded to above is S. 85 of the Indian Trusts Act, para. 2, which says "where property is bequeathed and the revocation of the bequest is prevented by coercion the legatee must hold the property for the benefit of the testator's legal representative." Such being the theory adopted by the law in the case of coercion used for the purpose of preventing revocation of dispositions under a will, that must necessarily be the theory to be followed when the same end is compassed by murder as also when the succession secured by the same unlawful means is intestate instead of testamentary.

The practical advantage attending the view under consideration to which also allusion was made above is this. It is not impossible especially in cases where the murder is secret that the guilty *prima facie* heir may succeed in passing himself off for a time as an innocent possessor and make transfers to third parties without notice. In such cases if the doctrine of exclusion were to prevail *bona fide* purchasers from him would be unprotected. The theory of trust, however, while saving the law from the reproach of permitting a person to retain the fruits of an act superlatively wrongful or of enabling purchasers with notice to take from him with impunity, would amply protect *bona fide* purchasers.

It only remains to add that the beneficial interest in the inheritance vests in those who would be entitled to it were the guilty heir out of the way, on the manifestly equitable ground

1. 115 N. Y. 506; 12 Am. St. R. 819.

**Vedanayaga Mudaliar v. Vedammal.** stated by Domat that those who would come in by reason of his exclusion should not be affected by his wrongful act. (Domat's Civil Law, Part II, Book I, see III § 2547).

The question of conviction or acquittal on which some stress was laid on behalf of the defendant would no doubt be relevant were the matter one of punishment for a crime, but here the Court is concerned only with private rights of parties as affected by a wrongful act, though such wrongful act may from the point of view of the Criminal law, be a punishable act. Attainder for murder under the English Law to which allusion was made in the argument, no doubt, presupposes a conviction, but this Court cannot possibly resort to so special and peculiar a doctrine of that law in laying down a rule of justice, equity and good conscience, as it is here called upon to do.

In the view taken by us the lower Court ought to have tried the question whether the defendant did commit the wrongful act imputed to her. The decree of the lower Court is reversed and the suit remanded for disposal according to law. The costs will abide the event.

#### IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subramania Aiyar and Mr. Justice Boddam

Venkata Dikshatulu and others... Appellants\* (*Plaintiffs*).

v.

Gavaramma and others ... Respondents (*Defendants and 3rd Defendant's legal representatives*).

**Venkata Dikshatulu v. Gavaramma.**

*Personal inam—Enfranchisement in favour of widow, effect of.*

The enfranchisement of a personal inam in favor of a widow does not vest in such widow an absolute estate. She has only a qualified estate and any alienation by her without necessity will not be binding on the reversioners.

*Cherukuri Venkanna v. Mantharathi Lakshmi Narayana Sastrulu*<sup>1</sup> followed.

*Subba Naidu v. Nagayya*<sup>2</sup> doubted.

Appeal from the decree of the Subordinate Judge's Court at Cocanada in O. S. No. 38 of 1900.

In this case the plaintiffs, as reversionary heirs of one Brahman, claimed to set aside certain alienations made by his widow,

\* A. No. 69 of 1901.

20th April 1904.

1. 3 M. H. C. R. 327.

2. 12 M. L. J. R., 89: S. C. I. L. B., 25 M. 424.

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the 1st defendant, in favor of the other defendants. The Subordinate Judge dismissed the suit holding that the plaintiffs were not the reversionary heirs of Brahmanna, the husband of the 1st defendant, and that Brahmanna through whom they traced relationship was a different person. Upon appeal the High Court, consisting of the *Officiating Chief Justice* and Mr. Justice *Bhashyam Aiyangar*, held that the plaintiffs proved their relationship with Brahmanna, the husband of the 1st defendant, and called for a finding upon the other issues in the case (as to the necessity for the alienation and the legal effect of the enfranchisement). The Sub-judge returned a finding against the defendants on both points.

*V. Krishnaswami Aiyar* and *V. Ramesam* for appellants.

*C. Ramachandra Rao Saheb*, *S. Srinivasa Aiyangar* and *I. V. Ramanuja Row* for respondents.

The Court delivered the following

**JUDGMENT:**—As regards the alienations under Exhibit J, we agree with the Subordinate Judge that it is not an alienation binding upon the reversioner. We cannot accept the suggestion that the grant of the Inam title deed to the 1st defendant, the widow, constituted the property her absolute property. The Inam was taken by inheritance by the 1st defendant as the widow of the previous holder. Though there has been some difference of opinion as to the effect of the enfranchisement of service Inams, there never has been any doubt that enfranchisement or grant of title deed in respect of personal Inams in any way affects the right of parties entitled thereto. This was laid down so far back as 1865 in *Cherukuri Venkanna v. Manthravathi Lakshmi Narayana Sastrulu*.<sup>1</sup> The law as laid down there was adopted by the legislature itself in Madras Act VIII of 1869. The case in *Subba Naidu v. Nagayya*<sup>2</sup>, to which our attention has been drawn is inconsistent with our view cannot be held to be of any binding authority considering that it is opposed to *Cherukuri Venkanna v. Manthravathi Lakshmi Narayana Sastrulu*<sup>1</sup> which it does not notice and to the terms of the enactment referred to above.

We must, therefore, accept the findings and reversing the decree of the Subordinate Judge pass a decree in terms of the prayer of the plaint with costs throughout inclusive of the costs incurred on the findings.

1. 2 M. H. C. R. 327.

2. 12 M. L. J. R., 89; S. C. I. L. R., 25 M. 424.—Ed.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH).

Present :—Mr. Justice Davies, Mr. Justice Benson  
and Mr. Justice Russell.

Visalakshiammal ... .. Appellant\* (1st Defendant).

v.

Sivaraman *alias* Veeraraghaven,  
minor, by next friend Vaidinadha  
Iyer and another .. ... Respondents (Plaintiff  
and 2nd Defendant).

Visalakshi- *Hindu Law of adoption—Agreement between natural father of adopted son and adopted—*  
ammal *Test of validity.*  
v.

Sivaraman. The natural father of the boy to be given in adoption is not legally incapable of acting as guardian for such boy and of making an agreement on the latter's behalf with regard to the property to be acquired by the adoption.

The validity of an agreement with regard to such property entered into by the natural father on behalf of the son to be given in adoption will depend upon the fact of the agreement being fair and reasonable and for the minor's benefit.

Where a widow took a boy in adoption on the express stipulation made with the natural father at the time of the adoption that in the event of disagreement between her and her adopted son a moiety of her husband's properties was to remain in her possession for her life and that the adopted son should only take it after her death,

*Held*, that the agreement being fair and reasonable was valid and binding on the adopted son.

Appeal from the decree of the Subordinate Judge's Court of Trichinopoly in O. S. No. 42 of 1901.

*P. R. Sundara Aiyar* and *T. V. Vaidyanatha Aiyar* for appellant.

*S. Subrahmania Aiyar* for respondents.

The Court (Sir *S. Subrahmania Aiyar*, *Officiating Chief Justice*, and *Mr. Justice Benson*) made the following

ORDER OF REFERENCE TO A FULL BENCH† :—The plaintiff, a minor, through his next friend his natural father, brought the present suit for the recovery of certain properties

\* A. No. 223 of 1901.

29th March 1904.

† 15th March 1904.

stated to have vested in him by virtue of his having been adopted to one Rengaswami Aiyer deceased, by his widow, the 1st defendant. The Subordinate Judge gave a decree to the plaintiff practically as prayed for. In the present appeal by the 1st defendant no question is raised as to the plaintiff's adoption. The dispute here relates only to the properties specified in schedule II to Exhibit I. dated 30th December 1893, executed by the 1st defendant on the day of the adoption in proof of it and setting forth the terms and arrangements as to the enjoyment of the property, of the adoptive father as between the plaintiff and the 1st defendant, and whereby the property described in the said II schedule to the instrument was in the event of disagreement between the plaintiff and the 1st defendant, to be enjoyed by the 1st defendant for her life and subsequent to her death to be taken by the plaintiff. The permission by the 1st defendant's husband in pursuance of which the adoption of the plaintiff took place was oral, and it appears to have merely enabled her to adopt a son, and made no reference as to the terms of enjoyment of the estate by either. There is also no doubt that the terms embodied in Exhibit I were consented to by the plaintiff's natural father prior to the adoption, and that it was in consequence of such consent that the adoption took place and Exhibit I was executed. The effect of the arrangement was to vest in the 1st defendant on the contingency mentioned, for her life almost an exact moiety of the property inherited by her from her husband, each moiety being of the value of about Rs. 10,000.

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The question for determination is whether the decree in favour of the plaintiff in so far as it relates to the property mentioned in the said II schedule to Exhibit I is sustainable.

Now, the effect of an adoption in the Dattaka form is to transfer the person adopted from his natural family to that of the adoptive father, such transfer necessarily carrying with it on the one hand the cessation of whatever right the adopted son possessed in the property of the natural family, and, on the other hand, under the Mitakshara law, the acquisition, among other things, by him of the right that accrues to an *aurasa* son on his birth in respect of the ancestral property of the father. Though a person may at his discretion give away a son of his in adoption, or refuse



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to do so, and though a sonless man may, according to his choice, accept, or refuse to accept, a son in adoption, yet once the giving and the accepting have taken place, the change of status, with the incidents as to property annexed thereto by the law, follows without the slightest reference to the volition of the party giving or the party taking. No doubt, the adoptive father can simultaneously with the adoption make such arrangement in respect of the joint property of himself and the adopted son as under the law a man can lawfully make notwithstanding the existence of an *aurasa* son. For example, as a part and parcel of the transaction of adoption the adoptive father may, of his own will, effect a partition of the property between himself and adopted son—*Cf. Kandasami v. Doraisami Aiyar*<sup>1</sup>. He may likewise provide for the maintenance of those who under the law would be entitled to be provided with maintenance out of the joint property. Such arrangement for maintenance may be made independently of any partition and would be an act within the scope of the father's paternal authority under the law, and the circumstance that the father refrains from exercising his paternal authority to the fuller extent of effecting a partition could not, in reason, detract from the validity of the arrangement made merely in respect of the maintenance of those who have a right thereto. So long as the partition, or the provision for maintenance, is fair and just, the adopted son cannot raise any question in respect of either; and it may be added that even when the provision for maintenance made by an adoptive father to a party entitled thereto seems to the Court more liberal than what, if the matter were litigated, it would itself award as maintenance, the provision will presumably be upheld if it was made *bona fide* and not for the purpose of alienating joint property under the guise of a provision for maintenance.

In cases of adoption after the death of the adoptive father by his widow under his authority, every lawful disposition of his property made by him even by a will would be binding on the adopted son for the obvious reason that those dispositions become operative from the moment of the death of the testator while the adoption must necessarily take place at some time subsequent to the death, and the rights accruing by virtue of such adoption are

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1. I. L. B., 2 M. 317.

only in that part of the estate which remains undisposed of at the moment of the adoption. For like reasons alienations by a widow of her life interest made before the adoption will also bind the adopted son (*Sreeramulu v. Kristnamma*<sup>1</sup>). But no transfer made or agreement entered into, even though simultaneously with the adoption, or as a condition thereto, can bind the adopted son if they are inconsistent with his rights under the law as they would stand at the time of the adoption apart from any agreement between the parties giving and receiving. Take, for example, a case where a natural father, in well-to-do circumstances, gives a son of his in adoption to a divided brother, who is comparatively poor, and enters into an agreement that the adopted son shall, notwithstanding the adoption, continue to be entitled to the property belonging to the members of the natural family. Would such an agreement be binding upon the members of that family? Would the adopted son in such a case enjoy the benefits accruing from survivorship incident to membership in that family? Take, again, the case of an adoptive father subject to the *Mitakshara* law arranging at the time of adoption that the adopted son is to have no interest in the ancestral property during the lifetime of the adoptive father, would that prevent the springing up of co-ownership between the adoptive father and the adopted son which is the inevitable incident of the relation of father and son under that law, while unseparated? These and similar conditions and agreements would not in any way touch the validity of the adoption itself as that altogether depends upon other considerations (compare *Bhaiya Rabidat Singh v. Maharani Indar Kunwar*<sup>2</sup>). They must necessarily be looked upon as agreements or conditions essentially repugnant to the status created by adoption, and therefore not binding.

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To attempt to support them on the footing of agreements by a person representing the adopted son is hardly possible. For before the adoption the natural father of the person to be adopted could represent the latter only in regard to the property vested in him at the time and no consent of his could operate on property coming to the son after the adoption, since the natural father's power to represent his son ceases with the giving away of him—*cf. Bhaiya*

1. I. L. R., 26 M. 143.

2. L. R. 16 I. A. 53.

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*Rabidat Singh v. Maharani Indar Kunwar*<sup>1</sup>. Similarly, the adoptive father could not purport to act on behalf of the person to be adopted before the adoption. And as soon as the adoption takes place the two become joint owners and the adoptive father can make transfers and enter into agreements so as to bind the adopted son only for purposes which make them binding on him under the law. Nor can weight be attached to the argument that the test of the validity of agreements entered into between the party giving and the party receiving a person in adoption simultaneously with it, is whether such agreements are beneficial to the adopted son. For though where some one duly empowered to represent a minor in a matter enters into agreements on his behalf, the validity of such agreements will depend on whether they are for the minor's benefit, yet inasmuch as neither the party giving nor the party receiving in adoption can lawfully represent him in agreements or things forming part and parcel of the transaction of adoption, no question of benefit or no benefit can legitimately arise for determination in such cases.

Nor, again, does the doctrine of approbating and reprobating with reference to the same thing seem to be capable of being rightly invoked against the adopted son in these cases. Except where the person given in adoption is of full age and assents to the conditions and agreements between the parties giving and receiving, a case which would be very rare, and in which such assent would preclude any question like the present being raised, the transaction would take place without any reference to the adopted son's will and consent. No doubt when a thing is capable of being rejected or accepted in its entirety the doctrine referred to should be applied if good faith requires its application. Now, the transaction of adoption is in the nature of a sacrament, or, at all events, it creates a *status*. If the condition attached is such as to invalidate the adoption itself, then there is an end of the matter, and there is nothing to affirm or disaffirm. If, on the contrary, the condition leaves the adoption valid, the legal relation created thereby cannot possibly be renounced and the adopted son must be held entitled to repudiate conditions sought to be attached to the adoption by the parties giving

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1. L. R. 16 I. A. 53 at p. 59.

and receiving when the conditions are inconsistent with his rights under the law.

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It is to be observed that the arrangements in the present case cannot be supported to any extent as a provision for maintenance for the 1st defendant, as the adoptive mother had, under the law, no power to reserve or provide maintenance for herself. When occasion for such provision arises the same must be made by the adopted son or under an order of Court.

In this view the reservation of a life-interest by the widow in the property in dispute will not bind the plaintiff who can, therefore, on attaining age, avoid the arrangement (*Ramaswami Aiyar v. Venkataramaiyan*<sup>1</sup>, though, until then, the possession of the widow, it would seem, cannot be disturbed.

That the plaintiff is not bound by the arrangement is in accordance with the conclusion in *Jagannadha v. Papamma*<sup>2</sup>, where the facts, so far as the present question is concerned, were practically on all fours with those here. But to the extent to which that decision is supported by reference to an alleged absence of power of alienation in the widow, the reasoning can be hardly treated as satisfactory, inasmuch as if the power of alienation possessed by a sonless man until he makes an adoption were a sufficient argument for upholding arrangements or directions such as were in dispute in *Lakshmi v. Subramunya*<sup>3</sup>, and *Narayanawami v. Ramasami*<sup>4</sup>, the unquestionable power of alienation which a widow possesses in respect of her life estate must likewise have gone to support the arrangement pronounced against in *Jagannatha v. Papamma*<sup>2</sup>. But it is difficult to see how the power of alienation possessed by a man prior to his adopting a son or by a widow prior to her adopting one has any real bearing on the matter. If the power has been availed of and if property has been alienated before the adoption such alienation will, of course, not be affected by what takes place afterwards. But when no alienation has actually taken place up to the time of adoption, it is as futile to refer to what the adoptive father or the adoptive mother could have done but for the adoption as to argue against an *aurasa* son acquiring by birth an interest in his

1. L. R. 6 I. A. 196.  
2. I. L. R., 16 M. 400.

3. I. L. R., 12 M. 490.  
4. I. L. R., 14 M. 172.

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father's ancestral property on the ground that before such birth the father could have given away all his property as he pleased.

It will be seen, therefore, that *Jagannatha v. Papamma*<sup>1</sup>, is, in truth, in conflict with the *ratio decidendi* in *Lakshmi v. Subramanya*<sup>2</sup> and *Narayanaswami v. Ramasami*<sup>3</sup> which *ratio decidendi*, as far as it can be gathered from the judgments, seems scarcely reconcilable with the fundamental principles underlying the law of adoption.

The following question is therefore referred for the opinion of a Full Bench :—

Whether the provision in Exhibit I in favour of the 1st defendant in regard to the property described in the II schedule thereto will bind the plaintiff ?

The opinion of the Full Bench was delivered by

BENSON, J. after stating the facts of the case as in the Order of Reference proceeded as follows :—

I understand that the plaintiff's natural father agreed to give his son in adoption and the 1st defendant made the adoption on the condition that the disposition of the property in Exhibit I should be binding on the plaintiff.

The question for determination is "whether the provision in Exhibit I in favour of the 1st defendant in regard to the property described in schedule II thereto will bind the plaintiff".

This question is one of no small difficulty. Notwithstanding the view expressed in the order of reference to which I was a party, further argument and consideration has now led me to the conclusion that the answer must be in the affirmative.

It is argued for the plaintiff that the matter is decided by the authority of the Privy Council and that was the view taken by this Court in the case of *Jagannatha v. Papamma*<sup>1</sup> where the facts were on all fours with those in the present case. In that case the learned Judges relied on the observation of their Lord-

1. I. L. R., 16 M. 400.  
2. I. L. R., 12 M. 400.

3. I. L. R., 14 M. 172.

ships of the Privy Council in *Bhaiya Rabidat Singh v. Indar Kunwar*<sup>1</sup> that it was difficult to understand how an agreement by the natural father "could prejudice or affect the rights of his son which could only arise when his parental control and authority determined". In that case, however, the question was whether the adoption itself was invalid, and the decision was that it was not. Their Lordships expressly point out that no trace of any reservation or condition is to be found in the deed of adoption and that no conditions were attached to the adoption.

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The case, therefore, can hardly be regarded as deciding that a condition made at the time of adoption and entered in the instrument evidencing the adoption, as in this case, is void. On the contrary, it is clear from the decision of the Privy Council, in the case of *Ramasamien v. Venkataramien*<sup>2</sup> that such an agreement by the natural father is, at all events, not void.

Their Lordships there say (at p. 101 :—"How far the natural father can by agreement before the adoption renounce all or part of his son's rights, so as to bind that son when he becomes of age, is also a question not altogether unattended with difficulty; although the case of *Chitko Raghunath Rajadiksh v. Janaki*<sup>3</sup> certainly decides that an agreement on the part of the father that his son's interest shall be postponed to the life interest of the widow is valid and binding. In this case their Lordships think it enough to decide that the agreement of the natural father which has been set out was not void, but was, at the least, capable of ratification when his son became of age."

The concluding words seem to indicate that in their Lordships' opinion the natural father was not legally incapable of acting as guardian of his son, and of making an agreement on his behalf with regard to the property to be acquired by the adoption. If that is the true position, then the question in each case would be whether the agreement so made by the natural father should or should not be upheld, and this I take it, would depend on whether the agreement in regard to the property was in itself a fair and

1. I. L. R., 16 C. 556; S. C. L. R., 16 I. A. 53.

2. I. L. R., 2 M. 91; S. C. L. R., 6 I. A. 196.

3. 11 B. H. C. R. 199.

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reasonable one, and one which taken as part of the contract for the adoption, was for the minor's benefit, as being a condition on which alone the adoption would be made. This is the principle that was adopted in the case of *Ravji Vinayakrav Jaganath Sankar Sett v. Lachmibai*<sup>1</sup> and I think that it accords with the general practice of the people in this presidency and their consciousness of what their law allows.

No doubt in the case of *Lachmi v. Subramanya*<sup>2</sup> this Court went further and held that when the disposition of property was one which the person adopting could make immediately prior to the adoption the agreement as to the property must be taken to be part of the contract for the adoption and be valid apparently in all cases. *Shephard, J.* put the case in these words :—

“ In the present case the adoption was made not by a widow, as in the case of *Lakshmana Rau v. Lakshmi Ammal*<sup>3</sup> but by the plaintiff's husband who, before the adoption took place, was unquestionably at liberty to alienate his property as he pleased, subject only to the plaintiff's right of maintenance. If being thus full owner he might before the adoption have disposed of his property in part or in whole in favor of the plaintiff, I fail to see why he should not, when making the adoption, stipulate with the other party to the adoption that a certain part of his property should be set apart for the maintenance of his wife and to that extent taken out of the category of property in which his intended son should have the full right of a co-parcener. It seems to me a mistake to say that the infant adopted son on whose behalf the natural father consents to such a stipulation can only be bound by that consent on the principle on which he might be bound by other agreements made on his behalf, *viz.*, on the principle that the agreement is made for a necessary purpose, (*Lakshmana Rau v. Lakshmi Ammal*,<sup>3</sup>) for the supposition is that, but for the consent of the natural father, the adoption would never have taken place. To object to the agreement is therefore tantamount to objecting to the adoption. The adoption and the disposition of his property by the father being part of one transaction, the son never acquired any

1. I. L. R., 11 B. 381.

2. I. L. R., 12 M. 490.

3. I. L. R., 4 M. 160.

interest in the property disposed of and therefore no question can arise as to his guardian's competency to deal with it."

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We may add that a reservation made by a widow in regard to her life interest, which she had the right to alienate before the adoption, would stand on the same footing.

The above case was followed in *Narayanasami v. Ramasami<sup>1</sup>* *Ganapati Aiyar v. Savithriammal<sup>2</sup>*, and the decision is in accordance with the decisions in *Ganesh Pandurang Apte v. Gangadhar Ramkrishna<sup>3</sup>*, *Chitko Raghunath Rajadiksh v. Janaki<sup>4</sup>* and *Basava v. Lingangauda<sup>5</sup>*. Among the Judges who decided these cases were such distinguished Hindu Lawyers as Sir T. Muthusami Aiyar, Nanabhai Haridas and Ranade, JJ. I think that great weight must be attached to the decisions of such men on a question like the present which I regard as one of Hindu Law modified by Hindu custom and usage developed in accordance with the conceptions of the present time. It is to be observed that there is no text of Hindu law which either recognizes or prohibits such an agreement as the present being entered into, and it is certain, as remarked by West and Buhler (*Hindu Law* 3rd edition, page 1106), that in actual practice "fair arrangements for the protection of the widow's interest during her life, are commonly made, and are always supported by the authority of the caste."

This is the principle on which Farran, J. proposed to decide cases like the present. He says "By Hindu Law an infant will be bound by the act of his guardian when *bona fide* and for his interest, and when it is such as the infant might reasonably and prudently have done for himself if he had been of full age, but not where the act appears not to have been for his benefit unless he has ratified it on reaching majority. I cannot but think that this principle ought to guide the Courts in considering whether agreements like the one under consideration can be upheld or not. If the stipulations are unreasonable such as giving to the widow an absolute power of disposition over the property, they should be rejected as *ultra vires* of the father; if reasonable, such as only to define and limit the son's enjoyment of the property, they should be upheld."

1. I. L. R., 14 M. 172.

2. I. L. R. 21, M. 10.

3. 6 B. H. C. R. 244.

4. 11 B. H. C. R. 199.

5. I. L. R., 19 B. 428.



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*Ravji Vinayakrao Jagannath Shankarsett v. Lakshmbai*<sup>1</sup>. The validity of the adoption, if legally made, is quite independent of the validity of any agreement as to the property. If the agreement is such as to be inconsistent with the fundamental idea underlying adoption and the purpose for which it is sanctioned by Hindu Law, as, for instance, if it deprived the adopted son of all right to the property of the adoptive father and so left him without any means of performing the necessary religious offices towards the manes of his adoptive father and his ancestors, it may well be that the Courts would regard the condition as essentially repugnant to Hindu Law and would refuse to uphold it. But it would seem that a fair and reasonable disposition of the property is not essentially repugnant to Hindu Law, or the purposes for which adoption is allowed, and is nowhere forbidden by that Law. Such dispositions are commonly made, and are upheld by the authority of the caste and the consciousness of the people. In these circumstances, I think that the Courts ought not to refuse to recognize them as binding on the minor, for whose benefit the adoption, coupled with the agreement as to the disposition of the property, was really made. It may be assumed that the natural father would not have agreed to the adoption, coupled with the disposition of the property, unless it was for the benefit of his son to do so: nor would the adoptive father have taken the son in adoption except on the condition agreed to. The adoption, of course, cannot be set aside and to set aside the condition which was coupled with the adoption, while maintaining the adoption, would require the justification of strong grounds of legal necessity or public policy.

In the present case the condition as to the property is a reasonable one, and such as the Courts should uphold. I would, therefore, answer the question referred to us in the affirmative.

DAVIES, J :—I concur.

RUSSELL, J :—I concur.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Ramanadhan  
Chetti  
v.  
Narayanan  
Chetti.

Present :—Sir S. Subrahmania Aiyar, *Officiating Chief Justice*,  
and Mr. Justice Bensen.

Ramanadhan Chetti ... Appellant\* (4th Counter-  
Petitioner—4th Defendant).

v.

Narayanan Chetti *alias* Ranga- Respondent Petitioner—  
nadhan Chetti. Plaintiff).

*Civil Procedure, Code Ss. 629 and 622—Review of decree after appeal—Order granting review illegal—Remedy either in appeal or revision.—Jurisdiction.*

Lower Courts have no right to interfere on review with decrees passed by them after an appeal has been preferred to an appellate court from such decrees.

An order granting the review of a decree from which an appeal is pending (although such appeal is preferred after the review) is *ultra vires* and can be set aside by the High Court in an appeal from the order granting the review or in revision under S. 622, C. P. C.

An objection to the jurisdiction of the judge in granting the review may be taken in an appeal under S. 623, C. P. C., from the order granting the review although such objection is not mentioned in the section as one of the grounds upon which an appeal against the order granting the review may be allowed.

Appeal from the order of the Subordinate Judge's Court of Madura (East), on M. P. No. 496 of 1901 in O. S. No. 14 of 1901.

Petition, under Section 622 of Act XIV of 1882, to revise the order of the Subordinate Judge's Court of Madura (East), dated 17th March 1902, on M. P. No. 496 of 1901 in O. S. No. 14 of 1901.

*S. Srinivasa Aiyangar* for appellant.

*P. R. Sundara Aiyar* and *C. V. Anantakrishna Aiyar* for respondent.

The Court delivered the following

**JUDGMENT :—**The respondent Narayanan Chetti *alias* Ranganadhan Chetti while residing in Saigon brought a suit in the Subordinate Court of Madura (East) through Venkasami Aiyangar who held a general power of attorney from him, and who was his

\*C. B., P. No. 344 of 1902.

A. A. O. No. 80 of 1902.

25th February 1904.

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recognised agent, against, among others, the appellant Ramanadhan Chetti as 4th defendant, with reference to certain disputes connected with the temple in Ariyakudi in the Sivaganga Zemindari, of which institution the respondent claimed to be one of the managers. Pending the suit the recognised agent and the appellant entered into a compromise in accordance with one of the terms of which the suit was to be withdrawn. The recognised agent not having in accordance with the compromise applied for the withdrawal of the suit, the appellant, under S. 375 of the Civil Procedure Code, brought the compromise to the notice of the Subordinate Judge who thereupon dismissed the suit on the 10th September 1901.

On the 5th November succeeding, the respondent applied for a review on the grounds that the recognised agent had no authority to enter into the compromise and that he acted fraudulently and in collusion with the respondent in the matter.

On the 13th December following, the respondent preferred an appeal to this Court against the decree dismissing the suit which appeal is still pending.

The application for review of the decree came on finally before the Subordinate Judge on the 17th March 1902 and was allowed, he being of opinion that the recognised agent had exceeded his authority in entering into the compromise though the allegation of fraud and collusion between the agent and the appellant had been given up. The decree was set aside and the suit was restored to the file with a view to its being proceeded with.

This order is impeached in the present appeal and in Revision Petition No. 344 of 1902 which it is necessary to consider with it.

The first point for determination is whether it was competent to the Subordinate Judge to pass the order in question, having regard to the existence of the appeal preferred by the respondent against the decree to which the order related and this question depends upon the view to be taken as to the effect of an appeal against a final decree, duly filed and pending, and upon the power of the Court passing the decree, in connection with the litigation which is the subject of the appeal.

One and, as it would seem, a somewhat extreme theory in the matter is that adopted in the New Hampshire Statute referred to

in *Stalbird v. Beattie*<sup>1</sup> according to which such an appeal actually vacates the judgment appealed from, leaving the case with its incidents as it stood before rendition of judgment, the pleadings and evidence remaining unaffected and it being the duty of the Appellate Court to hear and try the case as if no judgment had been pronounced or rendered in the Courts below.

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The case of the United States Court of Claims is peculiar in another way as that Court is empowered to grant a new trial pending an appeal against its decision, thereby in effect putting an end to the appeal and resuming jurisdiction over the cause. This "anomalous" power, as Chief Justice *Waite* of the Supreme Court of the United States described it in *United States v. Young*<sup>2</sup> is one conferred by an express enactment of the Legislature with reference apparently to the very special character of the claims capable of being brought before that Court, viz., claims founded upon any law of the Congress or upon any regulation of an Executive department or upon any contract with the United States.

But the more generally received theory and the one which has hitherto been acted on in this country, is that a pending appeal, without annulling the judgment appealed against, leaves it subsisting as a valid adjudication governing the rights of the parties, but that the further litigation and all matters connected therewith are transferred to and placed under the control of the Appellate Court. In this view it follows that when an appeal has been duly filed the Lower Court has, pending the decision of the appeal, no jurisdiction over the cause and can, as a rule, pass no order therein. In other words, the action of the inferior Court is, of necessity, suspended by the appeal until the Appellate Court has disposed of it, for, as observed in *Helm v. Boone*<sup>3</sup> "there could not be a greater absurdity in judicial proceedings than that a cause should be progressing at the same time in the inferior and appellate tribunals of the country<sup>4</sup>."

The *dictum* of Lord *Eldon* in *Huguenin v. Baseley*<sup>5</sup> cited on behalf of the respondent, referring, as it does, to a bill of review,

1. 72 Am. Dec., p. 317, 36 N. H. 445. 3. 22 Am. Dec., p. 75; 6 J. J. Marshall, 351.

2. 94 U. S. 258.

4. 22 Am. Dec. at p. 77.

5. 33 Eng. Rep. 724.

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which is the commencement of litigation distinct from that in which the appeal has been preferred, is not in point. As to the observation of *Sir James Bacon*, Chief Judge in Bankruptcy, in *Ex parte Keightley*<sup>1</sup> to the effect that the pendency of the appeal to himself from the order of the County-Court Judge did not affect the latter Judge's jurisdiction to re-hear the case in the County Court, that opinion was expressed with reference to the very wide terms of S. 71 of the Bankruptcy Act (32 and 33 Vic.,<sup>1</sup> C. 71), viz., "every Court which has jurisdiction in bankruptcy under this Act may review, rescind or vary any order made by it in pursuance of this Act". Moreover in *Ex parte Banco de Portugal*<sup>2</sup> whether, notwithstanding the provision quoted above, the Court of Appeal had power to re-hear a bankruptcy case after an appeal therein to the House of Lords, was treated as an open question.

So far as appears, then, there seems to be no direct English authority available with reference to the point under consideration. The ruling of the Judicial Committee in *In the matter of Candas Nurron-das Navivahu v. C.A. Turner*<sup>3</sup> to which Mr. Srinivasa Aiyangar drew our attention, that the amendment by the High Court (though not upon a review) of the order appealed against, after the appeal to Her Majesty had been presented was beyond the competence of the High Court, is one which, so far as it goes, is distinctly in favour of the view taken above as to the position of an inferior Court after an appeal, in regard to the matter under appeal. Ss. 545 and 546 of the Civil Procedure Code clearly imply that an appeal incapacitates the inferior Court from dealing with the litigation since even the power of staying execution is, once an appeal is made, taken away from that Court and is exercisable by the Appellate Court only. S. 623 of the Code, relating to review, even more plainly points to this view instead of as contended for the respondent, to the contrary. Not only is an application for review by a party who has already appealed disallowed by that section but even in the case of a party not appealing no review lies when there is an appeal by some other party on a common ground, or where the former as a respondent is in a position to bring before the Appellate Court the matter to be reviewed. The manifest

1. L. R., 9 Ch. 687.

2. 14 Ch. D. p. 1.

3. I. L. R., 13 B., p. 520 at p. 534. Apparently the original order in this case was in accordance with the judgment.—*Ed.*

intention of the provision is to avoid a conflict of jurisdiction and to prevent any action on the part of the inferior Court which would have the effect of controlling the powers of the higher Court with reference to the matter actually under appeal. Though a party who has applied for a review is for obvious reasons not precluded from appealing, the Code does not provide for the procedure to be followed when an appeal is preferred after the review. Of course both proceedings could not go on simultaneously. If the review proceeding is to be continued and the appeal stayed, expediency would require that the party affected by the final order in the review should be enabled to obtain a remedy in the pending appeal notwithstanding that such remedy would be in respect of what was not in existence on the date of the appeal. Anomalous as such a course would be with reference to what was said by *Brett, L. J.*, in *Ex parte Banco de Portugal* already cited<sup>1</sup> it may be open to the Legislature to introduce it into our procedure by a provision like that proposed in cl. 3 and 4 of S. 623 in the Civil Procedure Code Bill, now before the Viceroy in Council and referred to in the argument before us on behalf of the respondent. But in the absence of such an express enactment it must on principle be held that after the due filing of the appeal and during its pendency the power of the inferior Court in any way to deal with the litigation is completely in abeyance, except to carry out the decree which, of course, it is the duty of the Court to do, as S. 545 of the Civil Procedure Code in terms provides that the execution of the decree is not stayed by the mere fact that an appeal has been preferred against it.

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The two cases relied on on behalf of the respondent are clearly distinguishable. In *Bhart Chandra Mozumdar v. Ramgunga Sen*<sup>2</sup> when the matter of review was finally dealt with by the Lower Court no appeal was pending, as the one which had been presented had already been withdrawn. In *Thakoor Prasad v. Balak Ram*<sup>3</sup> though an application for leave to the Judicial Committee had been made, yet it had not been granted at the time of the disposal of the review and therefore no appeal can be said to have been pending. It follows, therefore, that the order of the Subordinate Judge granting the review, setting aside the decree and re-opening the litigation in his Court was *ultra vires*.

1. 14 Ch. D. 4 at p. 5. 2. Beng. L. R., F. B., p. 362. 3. 12 C. L. R., p. 64.

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Chetti.

In this view it remains to decide whether an appeal against the order granting the review is sustainable on the ground that the order was passed without jurisdiction in circumstances such as those of the present case. Notwithstanding that this ground is not one of those referred to in S. 629, C. P. C., the answer to the question must, it would seem, be in the affirmative for the reason that where an appeal is allowed, the question of jurisdiction is necessarily an appealable ground. Compare observations of *Jessel, M. R.*, in *In re Padston Total Loss and Collision Assurance*<sup>1</sup>. Should this view not be correct it must be held that this Court has power to revise the order of the Subordinate Judge in question under S. 622 of the Civil Procedure Code, for if the words of S. 629, C. P. C., viz., "such objection (i. e., any of those mentioned in the section) may be made at once by an appeal against the order granting the application or may be taken in any appeal against the final decree or order in the suit," would preclude an objection as to jurisdiction being taken in an appeal against an order granting the review, they would equally preclude, such objection from being urged in an appeal preferred against the final decree or order made in the suit (see *Broda Churn Bose v. Gobind Proshad Tevasy*<sup>2</sup>) and if it be held that he is not entitled to apply for revision under S. 622, the party will be altogether without a remedy.

For these reasons the order of the Subordinate Judge in question must be set aside. The respondent will pay the costs of the appellant in this and in the lower appellate Court.

#### IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmaniam Aiyar.

Chekka Venkataswamy ... ..Petitioner\* (*Plaintiff*).

v.

Gajjila Nagabhushanam ... ..Respondent (*Defendant*).

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Venkata-  
swamy  
v.  
Gajjila  
Nagabhusha-  
nam.

*Wagering contract—Agreement to pay differences—Payment by agent to third parties—Claim of agent for reimbursement—Contract Act, S. 30.*

S. 30 of the Contract Act is no bar to a claim for reimbursement by an agent entering into wagering agreements under his principal's authority for payment of differences (in the price of paddy) and paying moneys on behalf of his principal in pursuance of such contracts.†

\* C. R. P. No. 134 of 1903.

21st April 1904.

† But is this a "lawful" act done by the agent for which he is entitled to an indemnity from the principal within the meaning of S. 222 of the Contract Act? Cf. S. 224 of the same Act.—*Ed.*

1. 20 Ch. D. p. 137 at p. 142.

2. I. L. R., 22 Cal. p. 984.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the District Munsif's Court of Cocanada, dated 23rd December 1902 in Small Cause Suit No. 502 of 1902.

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swamy  
V.  
Gajjila  
Nagabhusha-  
nam.

In this case, the plaintiff, as broker for the defendant, entered into various contracts with third parties for the sale and purchase of large quantities of rice. These transactions were merely speculations on the rise and fall of prices and were not accompanied or intended to be accompanied by actual delivery of rice. They were therefore contracts of a wagering nature such as would, between the parties, fall within the purview of S. 30 of the Indian Contract Act. This suit was brought by the plaintiff on the allegation that the transactions had resulted in a loss and that after taking an account and adding certain sums for brokerage, commission and interest, the defendant owed Rs. 120 odd to plaintiff. The District Munsif of Cocanada found that a sum of Rs. 63 was due to plaintiff and that there was no agreement to pay brokerage &c., but dismissed the suit on the ground that the contracts out of which the plaintiff's claim arose were wagering contracts to which S. 30 of the Indian Contract Act applied. Hence this revision petition.

*V. Ramesam* for petitioner.

*C. Ramachandra Row Saheb* for respondent.

*V. Ramesam*—The Lower Court ought to have given a decree for Rs. 63. The contract between the plaintiff and the defendant being collateral to a wagering contract is enforceable. See *Thomas v. Hardy*<sup>1</sup>, *Read v. Anderson*<sup>2</sup>. In consequence of the said decisions 8 & 9 Vict c. ... had to be altered by the Gaming Act of 1892.

*C. Ramachandra Row Saheb* for respondent relied on the judgment of *Brett, M.R.* in *Read v. Anderson*<sup>2</sup>.

The Court delivered the following

ORDER\* :—"Before going into the question raised as to whether the plaintiff is entitled to maintain this suit, it is necessary to ascertain whether the plaintiff made payments on behalf of the defendant as alleged. The District Munsif should submit a finding

1. 4 Q. B. D.

\* 16th Nov. 03.

2. 13 Q. B. 779.



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nam.

upon the following issue on the evidence on record within six weeks from this date. Seven days will be allowed for filing objections :—

“ What amount, if any, did the plaintiff pay on behalf of the defendant in connection with the plaint-mentioned contracts?”

[The District Munsif submitted his finding to the effect that the plaintiff made payments to *third* persons and that a sum of Rs. 63-14-9 was due to plaintiff].

The Court delivered the following

JUDGMENT:—Here I am asked to give a decree only for Rs. 63 being the amount claimed as due to the plaintiff out of what he had paid as the defendant's agent to third parties on account of difference under wagering contracts entered into with them by the defendant through the plaintiff.

S. 30 of the Indian Contract Act relied on on behalf of the defendant does not bar such a claim. Whether the view of *Brett, M. R.* or that of *Bowen and Fry, L. J. J.*, in *Read v. Anderson*<sup>1</sup> is the correct view with reference to the precise question on which the learned Judges differed it is not necessary here to go into since no question of revocation was raised here. *Parakh Govardhan Bhai Hari Bhai v. Ransoordoss Dulabhdoss*<sup>2</sup> and *Shibho Mal v. Lakshman Das*<sup>3</sup> are clearly in favour of the view that S. 30 of the Indian Contract Act cannot be construed as covering a claim like the present and *Bhola Nath v. Mul Chand*<sup>4</sup> in so far as it goes points to the view that that conclusion is right. *Doshi Talakshi v. Shah Ujamsi Valsi*<sup>5</sup> is a decision under the Bombay Act which differs widely in its language from S. 30, Indian Contract Act, and the reasoning of the learned Judges clearly implies that but for the wide provisions of the specific enactment they were considering, the decision would have been different.

I therefore modify the decree of the lower Court by awarding to the plaintiff Rs. 63-14-9 with interest from the date of plaint to date of payment at six per cent. per annum and proportionate costs.

1. L. R. 13 Q. B. 779.

2. 12 B. H. C. R., 51.

3. I. L. R., 23 A. 165.

4. I. L. R., 25 A. 639.

5. I. L. R., 24 B. 237.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and

Mr. Justice Sankaran Nair.

Virabadran Chetty and others ... Appellants\* (*Respondents*).

v.

Nataraja Desikar ... Respondent (*Petitioner*).*Letters Patent S. 15—Charter Act—Civil Procedure Code Ss. 159 and 386—S. 386**C. P. C., exhaustive—Order directing examination of witness by commission—Judgment—Inherent jurisdiction of Courts to prevent abuse of process.**S. 386 C. P. C., is exhaustive of the cases in which a court can direct the issue of a commission to examine a witness. Gopal Chunder Sircar v. Karnodhar Moochee' a case under Act VIII of 1859 followed.*

Although on application of a party to a legal proceeding summons to a witness will ordinarily issue and a court is bound to issue a summons under S. 159 except in cases governed by S. 386, C. P. C., a Court has an inherent right to prevent an abuse of its own process and where it is shewn that the process is applied for not *bonafide* for the purpose of obtaining any material evidence the court will be justified in declining to issue process.†

Per *Subrahmania Aiyer, J.*:—An order of a single judge directing that a litigant is not entitled to insist on examining a witness in court but that a commission may issue to such witness is a judgment within the meaning of S. 15 of the Letters Patent.

Per *Sankaran Nair, J.*:—The High Court has power under the Charter Act to set aside an order passed by the Subordinate Judge refusing to examine a witness by commission and directing him to be examined in Court.

Appeal under S. 15 of the Letters Patent presented against the judgment of Mr. Justice Boddam, in C. R. P. No. 486 of 1903, presented against the order of the Subordinate Judge's Court of Madura (East), in M. P. No. 115 of 1903 (O. S. No. 88 of 1901).

*P. S. Sivaswami Aiyar and K. N. Aiyar* for appellants.*S. Srinivasa Aiyangar* for *P. R. Sundara Aiyar* for respondent.

The Court delivered the following

**JUDGMENTS:**—*SUBRAHMANIA AIYAR, J.*:—The appellants obtained a decree against the late Pandara Sannadhi of Tiruvannamalai Mutt in the Madura District for moneys lent to him. In execution of the decree certain gold and silver *pooja* articles &c., were attached and seized. The respondent, the present head of the Mutt, who had been made a party to the execution proceedings as the

\* L. P. A. No. 6 of 1904.

22nd July 1904.

† See *Blake v. Midland Railway Company*, (1904) 1 K. B. 503 (506):—*Ed.*

1. 7 W. E. C. R. p. 349.

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—  
Subrahmanīa  
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representative of the deceased, raised a contention that the attached articles were not liable to be sold in execution of the decree as they were not assets of the deceased but property appertaining to the Mutt. With reference to the investigation of the claim thus made, the appellants applied to the Subordinate Judge of Madura East to summon the respondent as a witness for the appellants. The respondent thereupon applied to the Subordinate Judge to take his examination on commission suggesting at the same time that he was not in a position to give, of his own personal knowledge, any evidence material to the questions at issue and that the appellants insist on his appearance in Court merely with a view to put pressure upon him and make him give up his claim or bring about a compromise, it being considered derogatory to heads of Mutts in the position of the respondent to appear in Court as witnesses. The Subordinate Judge refused to grant the respondent's application on the ground that the respondent being resident within the jurisdiction of the Subordinate Court and not being a person legally exempted from appearing as a witness in Court nor incapacitated from doing so by illness or infirmity, it was not competent to the Court to issue a commission for the examination of the respondent. On revision Mr. Justice Boddam set aside the order of the Subordinate Judge and directed that the respondent be examined on commission.

It is contended for the respondent :—

1. that the order of the learned Judge did not amount to a Judgment so as to allow of an appeal under the Letters Patent being preferred against it ;
2. that even in the circumstances relied on by the Subordinate Judge it is competent to the Courts of this country to direct the examination of a witness on commission if for adequate reasons it is thought fit to do so ; and
3. that assuming neither of these contentions is well-founded the circumstances of the case show that the appellants are seeking to compel the respondent's appearance not *bona fide*, but solely to obtain an improper advantage.

With regard to the first question I am unable to agree that the learned Judge's order does not amount to a judgment within the meaning of S. 15 of the Letters Patent. A litigant is

undoubtedly entitled to insist on the appearance of witnesses who could give evidence material to his case and if the examination of a material witness with reference to whom the issue of a commission is not warranted by law, is wrongly ordered to be taken on commission in spite of the objections of the party entitled to examine him in the presence of the Judge and in open Court the order so passed must clearly be held to deal with the question of the right, on the one hand, of the party seeking the personal attendance in Court and, on the other, of the liability of the person claiming to avoid it.

Virabhadram  
Chetty  
v.  
Nataraja  
Desikar.  
—  
Subrahmaniam  
Aiyar, J.

Passing to the next question I feel constrained to hold that the respondent's contention here also fails. I do not consider it necessary to refer to and consider, as Mr S. Srinivasa Aiyangar on behalf of the respondent invited us to do, the procedure of the Courts of Chancery in England and elsewhere in the matter of the issue of commissions to witnesses. The question of the issue of commissions for the examination of witnesses by Courts of this country governed by the Civil Procedure Code, is one to be dealt with entirely under the provisions of the Code and, obviously S. 386 provides for all the cases in which the legislature intended it should be competent to the Courts to issue a commission for the examination of persons resident within the jurisdiction of the Court. In the view that this provision is exhaustive on the point it is incumbent on the Court to insist on the attendance of a witness personally in Court if his evidence is material and the party entitled to adduce such evidence requires that course to be adopted. This construction of the section is supported by *Gopal Chunder Sircar v. Karnodhar Moorhee and others*<sup>1</sup> cited on behalf of the appellants and decided with reference to the Code of 1859, the provisions of S. 175 of which did not, so far as the point under consideration is concerned, differ from the present law. The provisions of S. 386 of the Civil Procedure Code are far from being of the comprehensive character of order XXXVII Rule 5 of the Rules of the Supreme Court and the explanation for this I take to be that it was not thought desirable to confer such wide powers on the general body of Judges presiding over the subordinate courts in this country.

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1. 7 W. R. C. R. 340.

Virabdran  
Chetty  
v.  
Nataraja  
Desikar.

Subrahmaniam  
Aiyar, J.

The last contention on behalf of the respondent, however, must, I think, prevail. No doubt on the application of a party to a legal proceeding summonses to witnesses would ordinarily issue as a matter of course, but even in the case of witnesses who are not parties to the proceeding, and who have no *locus standi* to object to their being called upon to appear, except on the ground that the Court has no jurisdiction to compel their attendance, a litigant's privilege of taking out summonses is unquestionably subject to the control of the tribunal which is called upon to enforce their attendance though such control will be exercised very sparingly and only in exceptional cases. In *Raymond v. Tapson*<sup>1</sup> after pointing out no leave of the Court was necessary for the issue of a subpoena to a witness, *Jessel, M. R.* took care to point out: "of course there was always a power in the Court to prevent an abuse of this power (of summoning witnesses)." He again observed; "the Court has still the power to say when the witness attends that the witness shall not be examined or that he shall be examined in open Court. It can always restrain the abuse of the power to summon witnesses." *Cotton, L. J.* added; "I quite agree that the Court ought to see that the parties do not abuse their privilege." Reference may also be made to the early case of *Rex v. Burbage*<sup>2</sup> where Lord *Mansfield*, admitting that in general a *habeas corpus ad testificandum* will lie to remove a person in execution to be a witness, refused to issue the writ in the particular instance as the application for it appeared to be "a mere contrivance". It is hardly necessary to point out that the control in question is an instance of the general authority of every Court of competent jurisdiction to prevent abuse of its process—an authority affirmed by the Judicial Committee in *Haggard v. Pelicier Freres*<sup>3</sup> cited by Mr. Srinivasaiyengar.

Turning to the case of a person who is not a mere stranger to the proceeding but who is party thereto, his situation obviously possesses a distinction which must not be lost sight of. In his case the other party requiring his attendance could compel a discovery of material information required by him with reference to the questions duly raised in the cause. Further where cases are well conducted each party is, of course, expected to go into the box to prove facts bearing on the case and within his knowledge, so as to

1. 22 Ch. D. 430 at p. 434.

2. 3 Burrows 1440.

3. (1892) A. C. 61.

give the other side an opportunity of testing the truth of such evidence by cross-examination. Where instead of waiting for and availing oneself of this natural opportunity and leaving it to the Court to draw an inference adverse to one who fails so to appear and support his own case, an attempt is made to insist on the opponent appearing in Court, it is but reasonable to scrutinise the grounds of such an attempt and the opposition thereto. Viewing this case with reference to these considerations it is pretty clear that the appellant's application is not *bona fide*. It is well known that persons in the position of the respondent consider it derogatory to be examined in Court as witnesses and when such persons happen to be men worthily filling the position of heads of Mutts, their attendance as witnesses in Court is highly distasteful to their disciples and co-religionists. Consequently the suggestion on behalf of the respondent that his attendance in Court is required not for the purpose of obtaining any material evidence in this case but from other and indirect motives which, if disclosed, would result in the dismissal of the application, is not altogether improbable. Had, however, the appellants been able to satisfy the Court that the respondent is personally aware of any facts or circumstances which would really help their case, the respondent ought no doubt to be compelled to appear, however inconvenient and disagreeable to him such appearance may be. The appellants, however, have failed to show anything of the kind judging from the affidavits filed on their behalf. I would therefore dismiss the appeal on this ground with costs.

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Chetty  
v.  
Nataraja  
Desikar.

Subrahmanian  
Aiyar, J.

SANKARAN NAIR, J.—'The appellants obtained a decree against the late Pandara Sannadhi of Tiruvannamalai Adhinam for a sum exceeding Rs. 7,000-0-0. On their application to execute the decree against the respondent as the legal representative of the deceased the High Court, directed that "execution do proceed against the appellant as the legal representative of the deceased defendant in respect of the moveable property of the deceased, if any, in his hands, which may be pointed out by the plaintiffs."

The appellants have attached in execution of their decree certain silver and gold articles on the ground that they were made by the deceased and form his property. The respondent claimed them as the property of the Adhinam. To prove their claim the appel-

Virabhadran  
Chetty  
v.  
Nataraja  
Desikar.  
—  
Senkaran  
Nair, J.

lants applied for a summons to the respondent to give evidence before the Court.

The respondent contended that on account of his position and sacred character no summons ought to have been issued to him to give evidence in open Court. He alleged that the application was "simply malicious and vindictive" and made to "harass" him and to compel him to pay up the decree amount, as the appellant well knew that he would not attend to give evidence before a Court and further that his evidence was immaterial as he was living at Kumbakonam from 1894 to 1902 and consequently knew nothing personally of the nature of the property attached. And he prayed that the Court might issue a commission to take his evidence if required by the appellant. The respondent resides within the jurisdiction of the Subordinate Court before whom he is sought to be examined.

The Subordinate Judge refused the application of the respondent to issue a commission. A petition was filed in this Court to set aside the order.

The learned judge of this Court who heard this petition held that the power to issue a commission is not confined absolutely to those cases mentioned in S. 383 of the Civil Procedure Code and the Judge may, if he thinks it fit, issue a commission in other cases also. He held further that considering the peculiar position of the respondent it would be an act of unnecessary harshness to insist upon his appearance in Court in this case when he is not a primary party to the suit and is likely to cause the matter to be compromised rather than undergo the ordeal of an examination in Court and being of opinion that the Charter Act gave him the power to interfere reversed the order of the Subordinate Judge as made without the proper exercise of his judicial discretion and directed the examination of the witness by a Commissioner.

The decree-holder appeals and the same contentions that were raised before the learned Judge are insisted upon before us. It is argued that the High Court has no power under the Charter Act to set aside the order passed by the Subordinate Judge and the case reported in *Tej Ram v. Harsukh*<sup>1</sup> is relied upon. I agree with the learned Judge that this contention is unsound.

—†—

1. I. L. R., 1 A. 101.

It is then argued for the appellant that the power of the Court to issue a commission to examine persons resident within its jurisdiction is confined to the cases mentioned in S. 383 of the Civil Procedure Code. This is denied on behalf of the respondent who relies also upon the English law in support of his contention. Under S. 4 of I William IV C. XXII and Rule 5 of Order 3 which only followed the old Chancery practice, the power to issue commission to examine witnesses was unrestricted, though such power was usually exercised only when the Court was satisfied that the witness could not be produced before the Court at the time of hearing on account of age, dangerous illness, precarious state of health or on the ground that he was to go out of jurisdiction. S. 10 of I. Will. IV C. XXII and Rule 18 of order XXVII also declare that the deposition of a witness living within the jurisdiction may be read in evidence at the hearing only when he is unable to attend "from illness or other infirmity." The Indian Procedure Codes in declaring the circumstances under which a commission may be issued seem to have accepted (Ss. 383 and 386 of the Civil Procedure Code) the rules that governed the practice in English Courts and adopted the ground under which alone the depositions of witnesses could be given in evidence at the hearing; and in addition regard being had to the peculiar conditions of Indian society, further empowered a Judge to issue commission to examine witnesses exempted from attendance in Court under Ss. 640 and 641 of the Civil Procedure Code. S. 640 exempts certain women, while under S. 641 the Government must notify the exemption from attendance of any person in their opinion entitled to that privilege on account of his rank. No power to exempt is given to the Courts. The enactment of those elaborate provisions in the place of the simple and comprehensive rule of English Law that an order may issue "where it shall appear necessary for the purposes of justice" seems to show that the Courts have not the absolute discretion or inherent power claimed for them on behalf of the respondent and a Judge is not therefore justified in issuing a commission except when authorized by the provisions of the Code. The case of *Gopal Chunder Sircar v. Karnodhar Moochee and others*<sup>1</sup>, is also in favour of this view. It is not to be understood that where these conditions exist the Judge is bound to issue a commission; where such examination may result in injustice to any or where it is not

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Chetty  
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Nataraja  
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—  
Sankaran  
Nair, J.

1. 7 W. R. C. R., p. 349.



Virabadrán  
Chetty  
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Nataraja  
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—  
Sankaran  
Nair, J.

calculated to permit of the evidence being fairly tested or where the application is made to avoid cross-examination before the court, a commission need not be issued. "Even if the Court should be of opinion that the refusal of a commission will prevent the evidence of the witness from being given at all, yet if the non-attendance of the witness before the tribunal which has to decide the case and the consequent inability of the tribunal to observe demeanour and hear the answers of the witness shall lead to injustice towards one of the parties, the commission ought to be refused." See *Brider v. Greenwood*<sup>1</sup>.

I am therefore of opinion that this contention of the pleader for the appellant ought to be upheld.

But this appeal must be dismissed and the order of the learned Judge confirmed on the ground that on the facts disclosed, the plaintiff—appellant is not entitled to obtain a summons for the attendance of this respondent.

No doubt under S. 159 of Act XIV of 1882 as under S. 149 of Act VIII of 1859 a party is entitled to obtain a summons for the attendance of any witness on application before the day fixed for disposal. The Judge has absolutely no discretion under this section and he cannot refuse the application. It is not for him to assume or infer that such witness is not likely to know anything of the matter in dispute or to be of any use to the partly applying. That is a matter for the applicant himself to consider.

But every Court has undoubtedly a right to prevent the abuse of its own process. It is true very strong evidence must be adduced by the party opposing an application for summons to show that it is not made *bona fide* and that the granting of such application would be permitting an abuse of the process of the Court. But after a careful consideration of the evidence I am not prepared to differ from the conclusion that this application for summons was really made for the purpose mentioned in the respondent's petition; the Court is not bound therefore to summon the witness and a commission may be issued, the respondent having consented to the same. The appeal in my opinion must be accordingly dismissed with costs.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar and Mr. Justice Benson.

Butchiraju and another... Appellants\* (*Plaintiffs*).

v.

Ramalingamurty and others ... Respondents (*Defendants*).

*Sale or mortgage—Lessee in possession—Fresh debt from lessee repayable at a fixed date* Butchiraju  
*—Lessee to enjoy absolutely on default—No further conveyance—Transfer of* v.  
*Property Act—Right to possession.* Ramalinga-  
 murty.

Where a person borrows from his lessee a debt and executes document which provides that in case of non-payment within a given period the lessee should enjoy the property absolutely the transaction is a sale and there is no right to redeem as upon a mortgage.

*Semle* :—A further sale-deed will be necessary under the Transfer of Property Act notwithstanding that the document may dispense with such further sale-deed.

*Quere* :—Whether the plaintiff is entitled to recover possession on the ground of there being no conveyance satisfying the provisions of the Transfer of Property Act when the right to obtain such conveyance has not become barred at the date of the plaintiffs' suit.

Second appeal from the decree of the District Court of Godavari in A. S. No. 310 of 1900 presented against the decree of the Court of the District Munsif of Rajahmundry in O. S. No. 45 of 1899.

The plaintiffs brought this suit to redeem certain lands from the third defendant to whom the father of defendants 1 and 2 had mortgaged them alleging that they had purchased the equity of redemption from defendants 1 and 2. On the date of the alleged mortgage on October 8, 1878, the so-called mortgagee was in possession of the lands as lessee for a term lasting till the end of 1886. This lessee then obtained this instrument which ran in these terms :—

“*Wayida Kriya Sunnud (Instalment sale-deed) executed by Ramadikshitulu, Inamdar &c., ..... in favour of Sakhimi Ramaraju, &c., ..... on 8th October 1878 corresponding to Tuesday, the 13th day of the bright fortnight of Asweeja of the year Bakudhanya. I have this day borrowed from you the sum of Rs. 130 on account of my necessity and for this I shall pay interest at 1 p. c. per mensem. I shall pay in cash the above principal and interest at any time within the 30th day of the dark fortnight of Phalguna of the year Vyaya and without any necessity for receipts, I shall cause the payments to be endorsed on this bond*”.

Butchiraju  
v.  
Ramalinga-  
murty.

"On failure of payment of principal and interest on the due date (Vayida), as the quit-rent inam field known as Nereduchettupampu, measuring about 2 acres of land with fruit trees thereon, situate within the boundaries of ..... is in your enjoyment and has to continue in your enjoyment for 9 years till the end of the year *Vyaya* under the term for the previous debt due to you, I execute this Vayida Kriya Sunnud having settled to relinquish the said land as sold. Therefore without a separate sale deed, treating this document as a sale deed, you shall enjoy the said land according to your pleasure from generation to generation. This is a Vayida Kriya Sunnud, executed with consent".

One of the defences to the suit was that the instrument was not a mortgage but operated as a sale on the happening of a contingency. The courts below found that the instrument did not make the lands security for the debt that there was therefore no mortgage, that the lands were then worth only about Rs. 260 that the amount due under the bond being about that amount, the parties must have intended a sale and that the attempt to redeem the properties more than 12 years after its operation as a sale was the result of the subsequent increase of the market value of the lands. The suit was accordingly dismissed by both the lower courts. Hence this second appeal in which the question was whether the instrument operated as a mortgage by conditional sale.

*K. Subrahmania Sastry* for appellants.

*C. Venkatasubbaramiah* for respondents.

The Court delivered the following

**JUDGMENT :—**We do not think that there was any mortgage of the land. By the contract between the parties the property was to be enjoyed by the third defendant as absolute owner if the now deceased father of the 1st and 2nd defendants through whom the plaintiffs claim failed to pay the money by the 24th March 1887. Though the parties agreed that no further sale-deed was necessary it may be that in order to comply with the provisions of the Transfer of Property Act a further sale deed should have been executed after the 24th March 1887 in order to complete the third defendant's title. It is not shown that at the date of the suit a right to obtain such an instrument has become barred. However this may be, the suit being based, entirely on an alleged mortgage the suit must fail, as there is in fact no mortgage.

We dismiss the second appeal with costs.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar  
and Mr. Justice Boddam.

Subramanian Patter and others ... Appellants\* (*Defendants* 1 to 5).

v.

Vembammal ... Respondent (*Plaintiff*).

*Hindu Law—Maintenance given under instrument—Change of circumstance—Right to Subramanian  
claim enhancement—Release of right—Question of construction.* Patter

v.

Where maintenance is awarded under a particular instrument and there were no Vembammal,  
words of release of the right to claim increased maintenance under a change of cir-  
cumstances;—

*Held*—There was no release of such a right.

It is a question of construction of the instrument whether such right is as a fact  
released. The mere fact that the maintenance is expressed to be paid for life does  
not show such a release.

*Nagamma v. Virabhadra*<sup>1</sup> referred to.

Appeal from the order of the District Court of South Malabar,  
in A. S. No. 223 of 1903, presented against the decree of the  
Court of the District Munsif of Alatoor in O. S. No. 135 of 1902.

*T. R. Ramachandra Aiyar* for appellants.

*V. Krishnaswami Aiyar* and *C. V. Anantakrishna Aiyar*  
for respondent.

The Court delivered the following

**JUDGMENT:**—The question whether an agreement with  
reference to the payment of maintenance operates as a release of the  
right of the party entitled to maintenance to have the amount  
raised is one of construction of the particular instrument.

There is nothing whatever in Exhibit I to suggest that the  
plaintiff had agreed to release her right to increased maintenance  
if circumstances entitled her to it.

The expression that the maintenance is to be paid to her for  
her life cannot be construed as involving such a release. *Nagamma*

\* A. A. O. No. 51 of 1904.

8th August 1904.

L. L. B. 17 M. 392.

Subramanian  
Patter  
v.  
Vembammal.

v. *Virabadra*<sup>1</sup> is a precisely similar case, though the report does not show that the agreement was for the payment of the maintenance for the life of the party there as in fact it was.

The concluding part of paragraph 3 of Exhibit I does not refer to the right to maintenance but to the respondent's claim to certain properties about which the parties had a dispute.

We dismiss the appeal with costs.

### IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Chinna Narasiah ... Appellant\* (3rd Defendant).

v.

Mangamma... Respondents (*Representatives of the deceased plaintiffs 1 and 2 and defendants 1, 2 and 4*).

Chinna  
Narasiah  
v.  
Mangamma.

*Madras Act II of 1894 and III of 1895, S.21—Rights of action affected—Pending actions not affected—Adoption made under pollution—Parties of the same gotra—Datta homam not necessary—Statute, construction of—Effect of new Statutes on pending actions and procedure.*

When the Legislature alters the rights of parties by taking away or conferring any right of action, its enactment does not affect pending actions unless it applies in express terms to such actions. It is otherwise when an enactment merely affects the procedure. S. 21 of Madras Act, III of 1895, does not negative the application of the above general rule. Madras Act, II of 1894, when extended to the office of Village Accountant in the Venkatagiri Estate did not affect pending suits relating to such office at the time of extension.

When parties are of the same gotra, the performance of *datta homam* is not necessary for the validity of an adoption; so that an adoption made under pollution of the persons giving and taking caused by the birth of the son adopted and the death of the wife of the adoptive father will not be invalid if the parties are of the same gotra.

Second appeals from the decree of the District Court of Nellore in A. S. No. 17 of 1900, presented against the decrees of the Court of the District Munsif of Kanigiri in O. S. No. 250 of 1897 respectively.

\* In S. A. No. 307 of 1902.

15th December 1903.

*C. V. Anantakrishna Aiyar* for *P. R. Sundara Aiyar* for appellants.

Chinna  
Narasiah  
v.  
Maugamma.

Respondents were not represented.

The Court delivered the following

**JUDGMENT** :—In these cases\* the Court had jurisdiction to entertain and decide the suits when they were instituted, *viz.*, on the 30th June 1897.

Madras Act, II of 1894, was extended to the office of Village Accountant in the Venkatagiri Estate during the pendency of the suits; but this did not take away the jurisdiction of the Court to decide the suits then pending before it and thus take away the plaintiff's right of action in the ordinary Civil Courts.

It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. But there is an exception to this rule, namely, where enactments merely affect procedure, but do not extend to rights of action" per *Jessel M. R.* in *In Re Joseph Suche and Co.*<sup>1</sup>.

There is nothing in the wording of S. 21, Madras Act III of 1895, to negative the application of this general rule.

The only other point urged by the appellant is that the adoption of the 2nd plaintiff by his uncle was invalid, because the natural parents and the adoptive father of the 2nd plaintiff were under pollution owing to the birth of the 2nd plaintiff and the death of the wife of the adoptive father.

The adoptive father and the 2nd plaintiff being of the same gotra the religious ceremony of *datta homam* was not necessary. *Gorindayyar v. Doraisami* <sup>2</sup>. That being so the adoption was not invalid. The second appeals fail and we dismiss them.

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\* S. A. Nos. 307 and 308 of 1902.

1. 1 Ch. D. 50.

2. I. L. R., 11 M. 5.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Boddam and Mr. Justice Bhashyam  
Aiyangar.

Oodayanasamy Tevar and another ... Appellants\* (*Petrs.*  
*Defts. 3 and 4).*  
v.

Alagappa Chetty and another ... Respondents (*Ctr.-*  
*Petrs., Plff. and*  
*Execution Pur-*  
*chasers).*

Oodayana-  
samy Tevar  
v.  
Alagappa  
Chetty.

*Mortgage-decree against father—Joint family consisting of father and sons—Father dying before execution—Sons not necessary to be joined—No notice necessary.*

Where the judgment-debtor dies before execution and the decree-holder executes the decree as against his minor sons (already parties to the suit) as legal representatives after a guardian *ad litem* for the latter is appointed by an order of court which is passed without obtaining the guardian's previous consent and properties are sold in execution, the action of the court in making such order is merely irregular and does not vitiate the sale especially where no objection is taken on that score in the courts below and the same guardian applies on the minor's behalf to set aside the sale.

Where a joint family consists of the father and his sons and a mortgage decree is obtained against them, it is neither necessary to join the sons as legal representatives of the deceased father on his death nor to give them notice of the order absolute.

Appeal from the order of the Subordinate Judge's Court of Madura (East) in C. M. P. No. 60 of 1902 in O. S. No. 44 of 1896.

One Arunachellam Chetty executed a mortgage in favor of Alagappa Chetty who obtained the usual mortgage decree against the father without making the sons parties. Before the decree could be executed the father died. The decree-holder executed the decree against the judgment-debtor's sons. The mortgaged property was put up for auction and purchased by one Lakshmanan Chetty. The sons put in a petition to set aside the sale on the ground that no order absolute was obtained and that no notice was given to them. No ground was taken in the petition that no consent of the guardian was obtained before he was appointed as guardian *ad litem* for the minor petitioners (the sons of Aruna-

\* A. A. O. No. 86 of 1902.

4th September 1903.

chella). The Sub-Judge dismissed the petition. The minor petitioners through their guardian appealed to the High Court.

Oodayana-  
samy Tevar  
v.  
Alagappa  
Chetty.

*K. Srinivasa Aiyangar* for appellants.

*T. Rangaramanujachariar* and *S. Srinivasa Aiyangar* for respondents.

The Court delivered the following

**JUDGMENT** :—The objection that the consent of the guardian was not obtained before he was appointed, was not taken in the petition to set aside the sale and he is now appealing as guardian on behalf of the minor. It is at best a mere irregularity. See *Mussumat Bibi Walian v. Banke Behari Pershad Singh*<sup>1</sup>. No notice was necessary to the father's representatives. The suit was against a father and sons forming a joint Hindu family, and it was, therefore, quite unnecessary to join the sons as representatives of the father on his death. The appeal is dismissed with costs.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Boddam and Mr Justice Bhashyam Aiyangar.

Chinnammal ... Appellant\* (*Plaintiff*).

v.

Mahomed Madarsa Ravuther ... Respondent (*Defendant*).

*Court Fees Act, Ss. 7 and 9—Suits Valuation Act, VII of 1887, Ss. 8 and 9—Suit for cancellation and delivery of mortgage—Valuation for Court fee—Plaintiff to fix—Power of Court to revise—Jurisdiction.*

Chinnammal  
v.  
Mahomed  
Madarsa  
Ravuther.

A suit for cancellation and delivery up of a mortgage bond falls under S. 7, para IV (c) of the Court Fees Act and the plaintiff is at liberty to value such relief. Such valuation must be verified by the plaintiff and the Court must accept the same and has no jurisdiction to revise it.

The valuation for purposes of jurisdiction is also determined by the value fixed by plaintiff (See S. 8 of Act VII of 1887).

Where, therefore, a plaintiff sued for cancellation and delivery of a mortgage bond for Rs. 4,000 but valued the relief at Rs. 50, such valuation cannot be revised by the Court and the suit is triable by a District Munsif's Court.

No rules are framed by the Madras High Court under S. 9 of the Suits Valuation Act with reference to suits referred to in S. 7, para. iv of the Court Fees Act.

\* C. M. A. No. 77 of 1903.

14th September 1903.

1. 7 C. W. N. 774.



Chinnaammal  
v.  
Mahomed  
Madarsa  
Ravuther.

Appeal from the decree of the District Court of Coimbatore, in A. S. No. 157 of 1901, presented against the decree of the Court of the District Munsif of Erode, in O. S. No. 542 of 1900.

*T. Rangachariar* for appellant.

Respondent was not represented.

The Court delivered the following

**JUDGMENT** :—The plaintiff sues in effect for the cancellation and delivery up of a mortgage bond for Rs. 4,000 executed by her to the defendant, and for purposes of court fees and jurisdiction the plaintiff valued in the plaint the relief sought at Rs. 50 and verified the same as part of the plaint.

The District Judge is right in holding that the suit falls under S. 7, paragraph iv (c) of the Court Fees Act and not paragraph iv (a), but he holds that the valuation of Rs. 50 given by the plaintiff cannot be accepted and that the true valuation is the amount of the mortgage bond, *viz.*, Rs. 4,000 as mentioned in the plaint. We are clearly of opinion that in cases falling under S. 7, paragraph 4, the law expressly provides (and only in that class of suits) that the plaintiff should state in the plaint itself under the sanction of verification the amount at which he values the relief sought, and the court has no jurisdiction to decline to accept the same or to revise it—a power which is limited to cases provided for by S. 9—which relates to an estimate given by the plaintiff of the annual net profits of the land or the market value of the land, house or garden as mentioned in S. 7, paragraphs v and vi. If the relief prayed for consequential upon the declaration be the recovery of any of the matters mentioned in paragraphs i, ii, iii, v, vi, vii, viii, ix, x and xi of S. 7, the mode of realising the relief is regulated by the Legislature itself in those paragraphs and in such cases the plaintiff must value the relief sought accordingly.

Turning now to the Suits Valuation Act (Act VII of 1887), it will be observed that under S. 8 the valuation given by the plaintiff in the case of suits falling under paragraph iv of S. 7 of the Court Fees Act shall also be the *valuation* for purposes of jurisdiction. S. 9 provides *inter alia* that it is competent to the High Court, with the previous sanction of the Local Government, to frame rules for the

valuation of suits referred to in paragraph iv of S. 7 of the Court Fees Act and for determining the jurisdiction of courts, but no such rules have been framed applicable to the cancellation and delivery up of an instrument in writing. Until such a rule is framed the valuation given in the plaint by the plaintiff cannot be revised. *Sivaiyama v. Minammal*<sup>1</sup> and *Gururajamma v. Venkatakrishnamma Chetti*.<sup>2</sup>

Chinnammal  
v.  
Mahomed  
Madarsa  
Ravuther.

We, therefore, reverse the order of the District Judge dismissing the suit and returning the plaint and remand the case to him for hearing and disposal according to law.

The costs of this appeal will be costs in the cause.

### IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. S. Subrahmaniam Aiyar, *Offg. Chief Justice*,  
Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

Isack Jesudasan Pillai ... Appellant\* (*Plaintiff*).

v.

Ramaswamy Chetty, the Official  
Liquidator of the Madras Building  
Society, 5th Branch ... Respondent (*Defendant*).

*Indian Companies Act, 1882, Ss. 131, 156 and 169—Notice to creditors to prove claim—  
Failure to come within time—Penalty—Distribution already made not disturbed—  
No necessity to file suit—Proof at later stage.*

Where a Company is wound up and an official liquidator appointed, a creditor of the Company who fails to bring forward his claim within the time mentioned in the notice published under S. 156 of the Indian Companies Act is not precluded from coming in at a later stage to prove his claim and is not bound to establish his claim by bringing a suit with the special leave of the Court under S. 136 of the said Act.

The penalty for his failure is that mentioned in the latter part of S. 156 under which the claimant will be excluded from the benefit of any distribution made before such debts are proved. He can, therefore, only claim a proportionate share in such assets as may remain undistributed at the time when he proves his claim and without disturbing any distribution made before such proof.

*In re General Rolling Stock Co.,—Joint Stock Discount Company's Claim*<sup>3</sup>, followed.  
Notice of appeal under S. 169 may be extended.

On appeal from the order of Mr. Justice Boddam, dated 1st day of May 1903, in the Ordinary Original Civil Jurisdiction in M. P. No. 4 of 1901.

Isack  
Jesudasan  
Pillai  
v.  
Ramasamy  
Chetty

\* O. S. A. No. 16 of 1903.

2nd December 1903.

1. I. L. R., 23 M. 490.

2. I. L. R., 24 M. 34.

3. L. R., 7 Ch. 646.

Isack  
Jesudagen  
Pillai  
v.  
Ramasamy  
Chetty.

*D. Chamier and Branson and Branson* for appellant.

*Grant and Greatorex* for respondent.

The Court delivered the following

**JUDGMENT:**—A preliminary objection is taken that notice was not given within the three weeks required by S. 189 of the Companies Act of 1882. Without deciding what this "notice" is, we think, that if such notice is necessary, the present is a fit case for extension of the time.

We accordingly extend the time to the 27th July 1908, the date on which notice was, in fact, given.

On the merits we think that the order of the learned Judge dismissing the petition is wrong.

The petitioner admittedly failed to bring forward his claim within the time fixed in the notice published under section 156 of the Act; but this omission does not preclude him from coming in at a later stage to prove his claim, nor does it necessitate his resorting to a suit to be instituted with special leave of the Court under S. 136, as contended by counsel for the Official Liquidator. The only penalty for failure to come in within the time stated in the notice is the penalty prescribed in the latter part of S. 156 viz., that the claimant is "excluded from the benefit of any distribution made before such debts are proved," that is, he can only claim a proportionate share in such assets as may remain undistributed at the time when he proves his claim and without disturbing any distribution made before such proof. This was decided in *In re General Rolling Stock Co.,—Joint Stock Discount Co.'s Claim*<sup>1</sup>, in regard to the English Companies Act, 1862, the provisions of which are substantially the same as those of the Indian Act. The claimant in the present case is admittedly a creditor of the Company.

We must, therefore, set aside the order of the learned Judge and direct that the claim of the petitioner be entertained by the liquidator and disposed of according to law.

Each party will bear his costs hitherto incurred before the learned Judge and the taxed costs of this appeal will be paid to the appellant by the respondent. The taxed costs of the Official Liquidator as between attorney and client is to be paid out of the fund.

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<sup>1</sup> L. R. 7 Ch. 648.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir S. Subrahmania Aiyar, *Offg. Chief Justice*,  
and Mr. Justice Boddam.

Karuppan Servai and others ... Appellants\*  
(Defendants).

v.

Alagara Koundan ... Respondent  
(Plaintiff).

*Mortgage—Once a mortgage always a mortgage, applicability of, to mortgages between 1858 to 1882.*

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Servai  
v.  
Alagara  
Koundan.

The doctrine of "once a mortgage always a mortgage" adopted by the Madras High Court though erroneous as pointed out by the Judicial Committee in *Pattabhiramier's Case*<sup>1</sup> and *Thambusawmy's Case*<sup>2</sup> governs mortgages executed subsequent to 1858 and prior to 1875 and between 1875 to 1882 the date when the Transfer of Property Act became law.

Second appeal from the decree of the District Court of Madura in A. S. No. 555 of 1901, presented against the decree of the Court of the District Munsif of Madura in O. S. No. 700 of 1900.

The question in the case was whether a mortgage by conditional sale executed between 1875 and 1882 executed itself according to its terms or was open to redemption after the date when according to its letter it became a sale.

*V. Krishnaswami Aiyar* for appellants.

*P. S. Sivaswami Aiyar* for respondent.

*V. Krishnaswami Aiyar* for appellant:—The mortgage is of 1877 and, consequently, is not governed by the Transfer of Property Act. The leading case upon the subject is that of *Pattabhiramaiyer's case*<sup>1</sup>. Then followed *Thambusami's case*<sup>2</sup>. The case of *Ramasami Sastrigal v. Samiyappanayakan*<sup>3</sup> dealt with a mortgage of 1864 and held in accordance with the suggestion in 1 M. at p. 23 that the erroneous decision of 1858 must govern the case. But the reasons given show that if the mortgage had been one executed after 1875 the Privy Council decision in *Pattabhiramaiyer's case* would have been

\* S. A. No. 507 of 1902.

29th February 1904.

1. 13 M. I. A. 560 at 562.

3. I. L. R. 4 M. 179.

2. I. L. R. 1 M. 1 at 23.

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Servai  
v.  
Alagara  
Koundan.

followed. (*Offg. C. J.* :—How can we say that parties intended to contract with reference to Privy Council decision as if that at once became known to the people). If it can be said that the decision of the High Court in 1858 at once became known and influenced contracts, why not apply the same fiction to the decision of the Privy Council. (*Offg. C. J.* :—They do not express any decisive opinion. It left the matter to the legislature. The legislature expressed its view in accordance with what the Privy Council said was erroneous view of the High Court. Why should we apply a different view to the intermediate period between 1875 to 1882). The legislature has declared its view only after 1882. If it said that the Act will apply retrospectively there will be an end of the case. (*Offg. C. J.* :—Why should we express a different view especially when the court has a number of times decided to follow the High Court's decision in mortgages between 1875 and 1882). If your Lordships feel bound by the case of *Venkatasubbaya v. Venkayya*<sup>1</sup> and the later cases I don't argue the matter any further. (*Offg. C. J.* :—Not that we should be absolutely bound. But there is no sufficient reason to interfere with the course of decisions). Then if the Transfer of Property Act applies, S. 98 shows that the contract will execute itself. S. 98 after referring to classes of mortgages or combinations goes on to say that in all other cases of anomalous mortgages the terms of the contract should govern the case. (*Offg. C. J.* :—The answer would be that the term is invalid as a clog on redemption. And the contention leads to the curious result that a pure conditional mortgage makes the condition as to the contract executing itself invalid, but if it only contained a covenant to pay, the term would become valid). It is no clog on redemption. S. 60 expressly says that the act of the parties may extinguish the equity. (*Offg. C. J.* :—The transaction should be subsequent to the mortgage. There was no equity of redemption to be extinguished by act of parties until the mortgage was executed and this agreement was in the mortgage itself).

*P. S. Sivaswami Aiyar* for respondent, referred to the judgment of *Turner, C. J.* in *Ramasami Sastrigal v. Samiyappanayakan*<sup>1</sup> as showing that in his view the High Court judgment should be

applied to the interval between 1875 and 1882 and to *Venkatasubbayya v. Venkayya*<sup>1</sup> and *Ramayya v. Krishnamma*<sup>2</sup>. No compensation should have been given to the mortgagee for improvements. (V. K. It is found to have been necessary.) (Offg. C. J.:— Apart from that, having regard to the doubtful state of the law, it is improvement in the *bona fide* belief of ownership). I gave him notice in 1894. (Offg. C. J.:—That is not enough. It may still be *bona fide* improvement. Moreover you did not sue till 1900).

Karuppan  
Servai  
v.  
Alagara  
Koundan.

The Court delivered the following

**JUDGMENT :—**We are unable to accept the proposition that in *Thambuswamy Moodely v. Hossain Rowthen*<sup>3</sup> the Privy Council intended to lay down that the erroneous view taken by the Madras Court up to that time of the law was no longer to be taken as enforceable. The reference to legislation upon the point in the judgment of the Privy Council would seem to suggest that the Judicial Committee took no decided view as to whether their own rendering of the law in *Pattabhiramaiyar's case*<sup>4</sup> or that of the local Courts was to prevail with reference to mortgages executed after 1858. In this state of things and having regard to the proposed legislation in the Bill for the Transfer of Property, the majority of the Full Bench in *Ramaswami Sastrigal v. Samiappa Naickar*<sup>5</sup> held that they were at liberty to deal with the case of a mortgage executed subsequent to 1858 but prior to 1875 with reference to the course of decisions in this country. In regard to mortgages executed between 1875 and 1882 when the 'Transfer of Property came into force also a similar view has been adopted in *Venkatasubbaya v. Venkayya*<sup>6</sup> and *Ramayya v. Krishnamma*<sup>7</sup>. The present case is governed by these latter decisions. The appeal therefore fails and is dismissed with costs. The memo. of objections also fails and is dismissed with costs.

1. I. L. R., 15 M. 230.

2. I. L. R., 23 M., 117.

3. I. L. R., 1 M. 1.

4. 13 M. I. A. 516.

5. I. L. R., 4 M. 179.

6. I. L. R., 15 M. 230.

7. I. L. R., 23 M. 117.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Boddam and Mr. Justice Russell.

Maria Susai Mudaliar... Appellant\* in A. No. 85  
of 1902 (*Plaintiff*).

v.

The Secretary of State for India in  
Council ... Respondent in A. No. 85  
of 1902 (*Defendant*).

**Maria Susai Mudaliar v. The Secretary of State for India in Council.** *Mitta*—Revenue sale for arrears—Purchase by Government—Restoration, effect of—Implied grant of customary supply of water—Easements of necessity—Second crop—Levy of water-cess—Supply of water through Government source—Improvements by Government—Second-crop cultivation.

Where the Government purchases a *mitta* sold for arrears of revenue and restores it to the son of the defaulter, the law will imply that this restoration or grant in the absence of a special contract to the contrary will carry with it all the rights of water and other easements of necessity existing at the time of such restoration or grant.

*Morgan v. Kirby*<sup>1</sup>; *Chanham v. Fisk*<sup>2</sup> followed.

The grantee and those claiming under him will be entitled to the customary supply to his tanks, and when the water arrives in his tanks he can do what he likes with it.

*Watts v. Kelson*<sup>3</sup>, and *The Secretary of State for India in Council v. Perumal Pillai*<sup>4</sup> referred to.

Such a right is not inconsistent with the common law rights claimed by Government to the water flowing in all natural channels which are subject to rights already acquired in water.

In the case of water flowing through a Government source which is improved by Government the Zemindar whose tanks depend for their supply upon the water flowing through such source may be entitled to a certain supply of water free; but the onus of proving the extent of this supply is on the Zemindar, and if he fails to discharge this burden his suit for restraining the Government from levying water-cess for second crop cultivation and for refund of the water-cess collected must be dismissed.

Appeals from the decree of the Additional Subordinate Judge's Court of Tinnevely in O. S. No. 28 of 1900.

*Joseph Satya Nadar* for appellant in A. No. 85 of 1902.

*The Government Pleader* for respondents in Do. and for appellant in A. No. 116 of 1902.

*T. V. Seshagiri Aiyar* for respondent in A. No. 116 of 1902.

\* A. Nos. 85 and 116 of 1902.

5th January 1904.

1. I. L. R., 2 M. 46.

3. L. R. 6 Ch. 166.

2. 37 R. R. 655.

4. I. L. R., 24 M. 279.

The Court delivered the following

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**JUDGMENT** :—The suit is by the present owner of Chockampatti Mitta, one of the mittas which constituted the Chockampatti Zemindari. The Collector of the District has imposed certain water-cess on lands cultivated with second crop in the mitta. These lands are irrigated from tanks, the primary source of supply to which through 2 channels is the Karuppanadi river which we understand is a jungle stream running, at the place where the channels take off, in Government land. For the purpose of these appeals the tanks Nos. 14 to 21 on the plan may be considered apart from the other two, Nos. 22 and 23. Tanks Nos. 14 to 21 receive their supply through the channel called Perunkal. The tanks Nos. 22 and 23 receive their supply through the channel called Papankal. The Subordinate Judge has granted the prayer of the plaintiff (1) as regards remission of water-cess charged in respect of tanks Nos. 14 to 21 and (2) as regards the injunction asked for in connection with these tanks so long as the second crop cultivation is raised with the customary water to which the plaint mitta has been found entitled by the Subordinate Judge. The Subordinate Judge has not granted any injunction in respect of tanks Nos. 22 and 23, but he has given the plaintiff a decree as to remission of water-cess charged under these tanks.

The plaintiff appeals in A. S. No. 85 of 1902 in so far as the injunction in respect of tanks Nos. 22 and 23 has not been granted.

The defendant has appealed in A. S. No. 116 of 1902 in so far as a decree has been given against him.

The mitta is part of a Zemindari originally granted on a permanent Sannad in 1803. It was sold for arrears of revenue in 1836 and was purchased by Government but was "restored" again in 1859 under a permanent sannad to the son of the previous Zemindar. In the interval between 1836 and 1859 (Fasli 1268) Government executed certain repairs to the Perunkal in consequence of which it is alleged that the supply of water to the tank Nos. 14 to 21 was increased. It should be mentioned that water from the Karuppanadi flows naturally into the Perunkal channel. There is no dam across



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the river. It is the case for the defendant that in consequence of the increased supply referred to above in the tanks Nos. 14 to 21, second crop cultivation has been extended and it is on this extended cultivation, that the defendant purports to have imposed a water-cess. That there has been extension of cultivation is beyond a doubt, but the evidence points to the conclusion that most of it took place prior to 1859 and anyhow there are no figures showing the extent of second crop cultivation before and after 1859. The plaintiff's case is that the Zemindari was "restored" in 1859 with all the rights to water which then existed. His case is that the flow of water which he receives now is precisely what he received in 1859, and so long as he gets only the supply he is entitled to by long-established user he argues that Government has no right to impose upon him any water-cess even if there is an extension of cultivation.

It is a fact that no improvement in the water-supply to tanks Nos. 14 to 21 has been effected since 1859.

It appears to us that the most important point in these appeals is the question whether the Zemindari was restored in 1859 with the rights of water as they then existed in the improved state of the channels. We are of opinion that it was restored with those rights. The Perunkal channel supplies both Government and Zemindari tanks. The ayan ryots and the zemin ryots take the water in the channel by turns of five days each. It is also a fact that the channel is being repaired at the joint expense of Government and the plaintiff. There is no dispute about this, and it is not denied that this custom is being rigidly adhered to now as it always has been. When the Government owned the Zemindari the water was divided as it is now. What then was the position in 1859 when Government "restored" the Zemindari to the son of the former owner? It is simply the case of the owner of all the lands under a channel restoring a portion to a former owner. In the absence of a special contract to the contrary the law will imply that this restoration or grant, carried all rights of water and other easements of necessity which existed at the time of the restoration or grant, namely, in 1859. (*Vide Morgan v. Kirby*<sup>1</sup> and *Chanham v. Fisk*<sup>2</sup>, also *Watts v. Kelson*<sup>3</sup>.) It is argued

1. I. L. R., 2 M. 46.

2. 27 R. R. 655.

3. L. R. 6 Ch. p. 166.

for the defendant that the zemindar in 1859 after the restoration could not be in a better position than he would have been in if he had never lost his zemindari. We cannot attach any importance to this argument. A new sannad was granted in 1859. It was not in all respects the same as the old one. Act VII of 1865 was not then in existence. But if Government did not then wish to restore the zemindari as it existed with all the rights of improved water-supply, that was the time to introduce the required alterations in the sannad. The rights of the Zemindar or his ryots to their accustomed mode of supplying their tanks are not referred to in any way at the time of restoration. We are of opinion therefore that the zemindari was restored with all its customary rights and easements. And if that is so the case is clear in so far as the tanks Nos. 14 to 21 are concerned. The following remarks of *Sir G. Mellish*, L. J. in *Watts v. Kelson*<sup>1</sup>, are applicable to the present case. "We are of opinion, however, that what passed to the plaintiff was a right to have the waterflow in the accustomed manner through the defendant's premises to his premises and that when it arrived at his premises he could do what he liked with it." In other words, the plaintiff is entitled to the customary supply to his tanks and when the water arrives in his tanks he can do what he likes with it. This is the view taken in *The Secretary of State for India in Council v. Perumal Pillai*<sup>2</sup>, a case which is on all fours with what is now discussed. We are of opinion therefore that the Lower Court's decree is right so far as tanks Nos. 14 to 21 are concerned. The right now decreed to the plaintiff is not at all inconsistent with the common law rights claimed by Government to the water flowing in all natural channels. The rights so claimed by Government and admitted by this Court are clearly set out by *Innes, J.*, in *Ponnusawmi Tevar v. The Collector of Madura*<sup>3</sup>, "I quite admit that the Government of this country has at all times assumed to itself and has the right in the interests of the public to regulate the distribution for use of any portion of the water flowing in the natural channels in which rights have not as yet been acquired, and to this extent the claim of the 1st defendant on behalf of Government cannot be gainsaid. But where a channel has been constructed by Government acting

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1. 6 Ch. A. p. 166.

2. I. L. R., 24 M. 279.

3. 5 M. H. O. R., 6, at p. 22.

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as the agent of the community to increase the well-being of the country by extending the benefit of irrigation and in pursuance of that purpose a flow of water is directed to the villages designed to be benefited, it becomes simply a question upon the circumstances of the case whether there has not been a conveyance to such villages in perpetuity of a right to the unobstructed flow of water in the channel." In many respects the facts in *Ponnusami Tevar v. The Collector of Madura*<sup>1</sup> are similar to the present one. The plaintiff in that case claimed a right to all the water flowing in a certain channel. The report states: "There is no evidence as to how the channel came to be constructed or the date of its construction, but it is shown satisfactorily and not denied that for a long series of years it has conveyed water from the Vygay river to the Puvandi tank. The land through which it runs before it reaches Puvandi belongs to Government villages." It was held in that case at p. 19 that "there can be no doubt that the right to an easement in the flow of water through an artificial water-course is as valid against the Government as it is against a private owner of land." The Court held that the plaintiff had a right of easement to the entire flow of water in the channel. The right which Government can claim or owns in the water flowing in the natural channels of the country must be subject to rights already acquired in such water. This is the principle laid down in *Kristna Ayyan v. Venkatachella Mudali*<sup>2</sup>, and in *Ramachendra v. Narayanasami*<sup>3</sup>. What the plaintiff's rights are in the Perunkal channel we have stated.

The case of tanks Nos. 22 and 23 is different. In this case Government has carried out improvements to the source of supply. The tanks are supplied primarily from the Karupunadi through the Papankal channel. We take it that the Karupunadi is a Government source, and by virtue of his engagements with Government the plaintiff is entitled to a certain supply of water without paying for it, but the burden of proving the extent to which he is entitled lies on the plaintiff, and if he fails to sustain this burden his suit to this extent must be dismissed. The 1st witness for the plaintiff proves that a head-sluice was built to the Papankal about 15 years ago and other improvements have been effected by Government in the

1. 5 M. H. C. R. 6.

2. 7 M. H. C. R., p. 60, at p. 70.

3. L. L. R., 10 M. 333.

distribution of the water-supply. A channel superintendent is also appointed by Government. The witnesses for the plaintiff further prove that extension of wet cultivation has taken place. The Subordinate Judge very properly states that the evidence for the plaintiff does not prove what is the customary supply to which the plaintiff is entitled in respect of tanks Nos. 22 and 23 and it does not prove what was the exact extent of second crop cultivation in 1859. Under these circumstances the Subordinate Judge has, we think, properly refused to grant the injunction prayed for by the plaintiff. He has, however, directed the refund of the water-cess charged by the defendant. We think this portion of the lower court's decree cannot be sustained. If the evidence was insufficient, as no doubt it was, to show what water precisely the plaintiff was entitled to by virtue of his engagements, then it is difficult to see how the imposition of water-cess on the second crop charged by the Collector can be held to be unlawful seeing that the water came from the Karupunadi which is a Government source. We must therefore modify the decree in so far as it directs refund of water-cess charged under the tanks Nos. 22 and 23.

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Appeal Suit No. 85 of 1902 is dismissed with costs. The plaintiff is not entitled to the injunction prayed for in respect of tanks Nos. 22 and 23.

In Appeal Suit No. 116 of 1902 the appeal is dismissed with costs in so far as it concerns tanks Nos. 14 to 21. It is allowed as regards tanks Nos. 22 and 23 in so far as it claims that the charge of the water-cess should be allowed. The lower court's decree directing a refund of the water-cess will be modified accordingly. The parties are to receive and bear proportionate costs on this part of the appeal.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH).

Present :— Mr. Benson, Mr. Justice Bhashyam Aiyangar,  
and Mr. Russell.

Ponnusami Mudali ... Appellant\* (*Defendant*).

v.

Mandi Sundara Mudali ... Respondent (*Plaintiff*).

Ponnusami Mudali v. Sundara Mudali. *Civil Procedure Code, Ss. 525 and 622—Refusing to file an award—Decree—Appeal—No revision.*

An order of a District Munsif refusing to file an award under S. 525, C. P. C., is a decree from which an appeal lies. *Dictum* of the Privy Council in *Ghulam Jilani v. Muhammed Hasan*<sup>1</sup>, followed. *Mana Vikrama v. Krishnan Nambudri*<sup>2</sup>, overruled.

Appeal under Section 15 of the Letters Patent against the Judgment of the Honourable the Chief Justice, dated 2nd February 1903 in C. R. P. No. 267 of 1902, presented under Section 622 of the Civil Procedure Code to revise the decree of the Court of the District Munsif of Vellore, dated 31st March 1902 in O. S. No. 395 of 1900.

The Court (*Mr. Justice Subrahmania Aiyar* and *Mr. Justice Boddam*) made the following

ORDER OF REFERENCE TO A FULL BENCH :—The respondent in this appeal applied to the District Munsif of Vellore under Section 525 of the Code of Civil Procedure to file an award made by two arbitrators to whose decision the respondent and the appellant had submitted certain differences in connection with a partnership trade they had been carrying on.

The application having been registered as a suit, the appellant appeared upon notice and opposed the filing of the award. The District Munsif having taken evidence, and being of opinion that the arbitrators had been guilty of misconduct in making the award refused to file it and “set it aside.”

The respondent then applied to this Court under S. 622 of the Civil Procedure Code to have the order revised, and the

\* L. P. A. No. 20 of 1903.

15th October 1903.

1. L. R. 29 I. A. 51.

2. I. L. R., 3 M. 68.

learned Chief Justice came to the conclusion that the circumstances referred to by the District Munsif as involving misconduct were mere informalities in the procedure of the arbitrators, that no misconduct on their part was made out and that under section 526, Civil Procedure Code, the District Munsif had no power to set aside the award, and consequently reversed the order of the Munsif and directed the award to be filed.

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In this appeal one point which arises for determination has reference to the nature and effect of the order of the District Munsif. If the said order was a decree within the meaning of the expression as used in the Civil Procedure Code and one appealable under the provisions thereof, this Court would have no jurisdiction to interfere in revision.

In *Mana Vikrama v. Krishnan Nambudri*<sup>1</sup>, it was no doubt held that a decision whereby a Court refuses to file an award under section 526 is not a decree but only an order against which the Code allows no appeal. The learned Judges based this view solely on the ground that the proceeding under Section 525 is not in fact a suit—a ground, which, with all deference to the learned Judges, is obviously untenable, inasmuch as the section itself speaks of the proceeding, once the application is registered, as a suit and it is now established beyond controversy that such a proceeding is a suit though it be one commenced by an application and not by a plaint in the usual form. Our attention was also called to the following observation in *Gowdu Magata v. Gowdu Bhagavan*<sup>2</sup> tending to the same view:—"In the former case (*i. e.*, where the Court refuses to file the award) no right is conclusively negatived, for the award can be enforced by an ordinary suit" (see at p. 300). But the suggestion thus made is in effect in conflict with the observations of the Judicial Committee in *Muhammed Nawaz Khan v. Alam Khan*<sup>3</sup>, which clearly imply that any matter which is directly and substantially in issue and is determined in a proceeding under Section 525 would be *res judicata* in any subsequent litigation between the same parties involving the same points.

Moreover, according to the *ratio decidendi* of the decision of the majority in the Full Bench case of *Mahomed Wahiuddin v. Hakim*<sup>4</sup>

1. I. L. R., 3 M. 68.  
2. I. L. R., 23 M. 209.

3. L. R. 18 I. A. 73.  
4. I. L. R., 25 C. 757.

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an order such as that in question here is a decree ; and the recent case of *Ghulam Jilani v. Muhammed Hassan*<sup>1</sup> relied on by the appellant shows that the Judicial Committee apparently take the same view. At page 58 of the report, their Lordships, dealing with the case of applications to file awards made out of Court, observe :—Proceedings described as a suit and registered as such should be taken in order to bring the matter \* \* under the cognizance of the Court. That is or may be a litigious proceeding—cause may be shown against the application—and it would seem that the order made thereon is a decree within the meaning of that expression as defined in the Civil Procedure Code.” And as at page 56 they say “ the decisions of the Indian Courts on those provisions (*viz.*, those of the Civil Procedure Code relating to arbitrations) are so conflicting that it may be useful to state the conclusions at which their Lordships have arrived on some of the disputed points brought to their attention in the course of the argument” the view stated in the passage quoted above has to be accepted as an actual decision by the Committee on the point dealt with. It, therefore, seems to us that the ruling in *Mana Vikrama v. Krishnan Nambudri*<sup>2</sup> on the point under consideration is erroneous.

Next, taking the Munsif's order in question to be a decree it seems to us to be clear that an appeal lay against it, for the prohibition against an appeal contained in the concluding part of Section 522 has reference only to a decree passed on an award accepted as valid and cannot apply to an order amounting to a decree which neither rests on nor is made in accordance with an award but proceeds on the footing that there is no valid award. The cases *Kombi Achen v. Pangi Achen*<sup>3</sup>, and *Krishnan Chetti v. Muthu Palandi Vacha Makali Tevar*<sup>4</sup>, are decisions relating to decrees passed in accordance with awards.

We, therefore, refer for the Full Bench the questions :—

(1) Whether the order of the District Munsif, dated the 31st March 1902, refusing to file the award and setting it aside is a decree ? and

(2) Whether an appeal lay against it ?

1. L. R. 29 I. A. 51.

2. I. L. R., 3 M. 68.

3. I. L. R., 21 M. 405.

4. I. L. R., 22 M. 172.

C. Sankaran Nair and R. Sivarama Aiyar for appellant.

B. Shadagopachariar for V. Krishnasamy Aiyar for respondent.

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This appeal coming on for hearing before the Full Bench, the Court expressed the following

**OPINION :—** We think that the matter is practically concluded by the *dictum* of the Privy Council in the recent case of *Ghulam Jilani v. Muhammed Hassan*<sup>1</sup>, that an order made on an application to file an award under Section 525 of the Civil Procedure Code "would seem to be a decree within the meaning of that expression as defined in the Civil Procedure Code." This is a considered *dictum*, and is, we think, fully in accordance with the scheme and policy of the Code.

The decision of the Privy Council in *Muhammad Nawaz Khan v. Alam Khan*<sup>2</sup> is not at variance with the above view. We think that the contrary view taken in *Mana Vikrama v. Krishnan Nambudri*<sup>3</sup> is erroneous.

Our answer to the reference made to us is (1) that the order of the District Munsif refusing to file the award and setting it aside is a decree, and (2) that an appeal lay against that decree.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson, and Mr. Justice Bhashyam Aiyangar.

Venkatagiri Iyer ... Appellant\* (*Plaintiff*).

v.

Sadagopachariar, and another ... Respondents (*Defendants*  
2 and 3).

*Civil Procedure Code, S. 257 A—Sanction of Court—Absence of sanction, effect of—Alteration of decree—Entry of satisfaction—Limitation—Res judicata—Attachment—Effect of dismissal of execution petition on attachment—Order upon a preliminary issue, effect of.*

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A decree of Court cannot be subsequently altered except under Ss. 206 or 210.

An agreement between the decree-holder and the judgment-debtor securing some additional benefit to the former does not become a part of the decree by sanction of court, but can only be enforced in a separate suit.

\* A. No. 69 of 1900 and A. A. O. Nos. 105 and 109 of 1902. 14th October 1900.

1. L. R. 29 I. A. 51. 2. I. L. R., 18 C. 414. 3. I. L. R., 3 M. 68.



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Without sanction of court, such agreement is void and cannot be enforced either in execution or in a separate suit. To hold that the section does not make it void for a separate suit is to defeat the very policy of the section which is intended to protect judgment-debtors from being coerced by threat of execution proceedings to submit to unconscionable extortion by the decree-holders and is also opposed to the clear terms of the section.

A sanctioned agreement to give time for the payment of the judgment-debt operates as a stay of execution under S. 244.

An agreement which adjusts the decree is enforceable in a separate suit, even though sanction has not been obtained, if it does not secure the payment of any sum more than the amount payable under the decree.

If the sanctioned agreement makes any sums payable towards the decree in any particular manner, and payments are so made, such payment should be certified to the court under S. 258; otherwise such payments will not be recognised in subsequent execution proceedings. The judgment-debtor can only sue for breach of contract, if such payments were not given credit for.

An application for sanction under S. 257 A is not a step in aid of execution and cannot furnish a fresh starting point of limitation for execution.

Where after execution was barred, applications for execution had been put in and granted after notice to the parties, and even moneys of the judgment-debtor in court had been paid to the decree-holder, held that the Judgment-debtor was debarred from raising the question of limitation.

An attachment made after notice to the Judgment-debtor is not discharged by the mere fact of the application for execution being subsequently dismissed for default of prosecution.

A determination of one of the questions of law which may have to be decided before execution can be granted, is not an order in execution and cannot operate as *res judicata* unless it has been followed up by an order in execution. Nor need such a determination in the absence of an order following it be appealed against.

Where an execution petition is withdrawn after the determination of one of the preliminary questions arising in the case such determination is no more than the expression of the Judge's opinion and is of no effect for any purpose.

Appeal from the order of the District Court of Salem, in M. P. No. 229 of 1902 in E. P. Nos. 36 and 38 of 1898 in O. S. No. 11 of 1893 on the file of the Subordinate Judge's Court of Bellary and Salem.

*P. R. Sundara Aiyar* and *T. B. Venkatarama Sastri* for appellants.

*V. Krishnaswami Aiyar* and *T. Narasimha Aiyangar* for respondents.

The Court delivered the following

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**JUDGMENT :—**BHASHYAM AIYANGAR, J.—The respondent in Appeal Against Order No. 105 of 1902 who is also the respondent in Appeal Against Order No. 109 of 1902 and the appellant in Appeal No. 69 of 1900 is the decree-holder in O. S. No. 12 of 1886 which was brought upon a hypothecation bond for Rs. 3,000 executed in September 1880. The decree was passed on the 22nd November 1887 for Rs. 6,000 with interest at 18 *per cent. per annum* and the amount of the decree was recoverable both personally against the mortgagors and by sale of the mortgaged property subject to a prior mortgage in favour of the 8th defendant in that suit whose suit on his prior mortgage was then pending in O. S. No. 8 of 1881 to which the puisne mortgagee, the plaintiff in O. S. No. 12 of 1886, was no party. O. S. No. 8 of 1881 was compromised and the decree in the terms of the compromise was passed on the 30th day of September 1890 for the sum of Rs. 68,300 which was to be recoverable subject to the conditions therein provided by sale of the mortgaged properties. The mortgaged properties were brought to sale in execution of the decree in O. S. No. 8 of 1881 and purchased by the plaintiff therein whose purchase was confirmed on the 3rd day of October 1896. He applied for possession under S. 318, Civil Procedure Code on the 2nd day of December 1896 and obtained possession on the 19th day of February 1897. The decree-holder in O. S. No. 12 of 1886 relying upon certain agreements entered into between him and the mortgagors subsequent to his decree objected under section 335, Civil Procedure Code to the delivery of the property to the purchaser in execution of the decree in O. S. No. 8 of 1881 claiming that he was entitled to remain in possession of the property by virtue of such agreements which will be immediately referred to. His objection was overruled on the 5th day of January 1898 and in O. S. No. 41 of 1898 he sought to recover possession of the property from the 2nd defendant therein to whom the property had been conveyed by the decree-holder and purchaser in O. S. No. 8 of 1881. The suit having been dismissed by the decree, dated the 13th day of November 1899, he has preferred to this Court Appeal No. 69 of 1900.

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On the 17th day of December 1888 the mortgagors—Judgment-debtors in O. S. No. 12 of 1886, executed a power of attorney (Exhibit IV in A. A. C. No. 105 of 1902) whereby the decree-holder was authorized to receive all the collections of rent made from the mortgaged property (which was a Mitta) by the moniegar of the Mitta and to appropriate the same towards the decree amount after payment of peishcush and establishment charges. It was further stipulated in the power of attorney that the mortgagors were to render all the necessary assistance in the matter of collections being made by the moniegar and that until the decree was liquidated they were not to revoke the power of attorney nor the orders to be issued by them to the moniegar and the other village officials for carrying out the said arrangement. On the same date, viz., the 17th December 1888, the moniegar wrote to the decree-holder (vide Exhibit XI in A. A. O. No. 105 of 1902) informing him that an order had been received by him from the Mittadars (the mortgagors) that he should remit all the collections made from the Mitta to the decree-holder and that he would accordingly do so without fail.

On the same day the judgment-debtors (defendants Nos. 1, 2, 4 and 5 in O. S. No. 12 of 1886) presented a petition to the Court under Ss. 257 and 305, C. P. C., which runs as follows :—

“ 1. Our properties in the said suit are now brought forth for sale. If they are sold away we should incur heavy loss. We have requested the plaintiff in the suit to stay the sale.

“ 2. We have also given an Agentnama to plaintiff enabling him to collect all the moneys due from the undermentioned Mitta villages through the moniegar of those Mittas, to pay the peishcush and take the balance in satisfaction of his decree amount.

“ 3. Until the whole amount of the decree is satisfied according to the agreement mentioned above we shall not interfere with the money collections of the said Mittas ; nor shall we do anything which would cause loss to plaintiff. In collecting moneys, we shall do all manner of help to plaintiff even pecuniarily and we shall not do either expressly or impliedly, anything which is obstructive, unjust or fraudulent. We shall act according to plaintiff's wish ; and we shall not either withdraw or cancel the aforesaid Agentnama until the whole debt has been satisfied.

"4. In case the plaintiff is not able to realize the said moneys whether from difficulties raised by us or others, or from any other cause in case plaintiff is confronted with obstacles or hindrance, deficiencies or damages, and in case he is reduced to that pass, we hereby agree to let the plaintiff bring up all the properties named in the decree for sale in satisfaction of the amount decreed with costs, calculating interest on them at 2 *per cent. per mensem* from the date of the decree to the date of realization, independently of any payments that that may have been made.

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"5. The conditions of this petition should not be supposed either to have superseded the decree or modified it, nor should it be barred by limitation until the whole sum has been paid in the manner named above.

"6. We, therefore, pray that the Court will be pleased to give sanction according to the aforesaid sections, corroborate the aforesaid arrangements and order us to act according to this petition."

On the same date, the Judge passed an order staying the sale until the Wednesday following adding that the judgment-creditor should in the meanwhile attach his signature to the petition presented by the defendants. The decree-holder without affixing his signature to the petition already presented by the judgment-debtors presented an independent petition apparently on the 19th day of December 1888 which after referring to the order passed by the Court on the petition presented by the defendants runs as follows :—

"The plaintiff agrees for the postponement of the sale in the above suit, provided the Court is pleased to sanction and confirm the arrangement and the agreements made with him on the 17th and 18th of this month by the said defendants under Ss. 257-A and 305 of the Civil Procedure Code."

It will be noted that in this petition the decree-holder refers not only to the power of attorney above referred to which alone was mentioned in the petition of the 17th day of December 1888 but also to an agreement of the 18th day of December 1883 which

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was entered into subsequent to the petition of the 17th day of December 1888 and the order thereon. The nature and terms of this new agreement were not set forth in the petition nor was it produced before the Judge. The District Judge endorsed on the petition the following order on the 19th day of December 1888.

“The agreement proposed is sanctioned. The sale will now be stopped”. The agreement of the 18th day of December 1888 above referred to is a registered usufructuary mortgage (Exhibit A in Appeal No. 69 of 1900) and the operative part of it runs as follows :—

“ We have mortgaged with possession the following properties to you so that you may enjoy (them) in lieu of interest for Rs. 8,810 which is inclusive of the interest and costs of O. S. No. 12 of 1886 and which is due to you from us. We will not interfere therein until the aforesaid debt is paid off in full. We will grant pattas and muchilikas without there being loss to you and we will render every aid in the collection of money. We will get peishcush, &c. paid through your lessee. We will not subject you to any kind of liability. You shall not be answerable for any kind of loss. We have agreed to pay the aforesaid amount within 5 years. If any loss, obstruction or hindrance or deceit or evil deeds be occasioned by anybody to the aforesaid properties or to any of your rights therein, this shall in no way prevent (you) from recovering at your pleasure the aforesaid amount by means of the several properties which are shown as security and which are mentioned in the aforesaid decree, and from recovering from us personally by taking execution for the aforesaid decree amount in accordance with the conditions of the said decree. If we allow the aforesaid properties to be sold by auction sale, we are answerable to pay the (amount of) loss which you may fix therefor. Grant of pattas, receiving muchilikas and conducting attachment proceedings, &c. shall be attended to by Thammanier, of us. Having mortgaged with possession to you, we have delivered possession of the properties, the particulars whereof are as follows :—”

The decree holder's lessee above referred to in the mortgage deed Exhibit A is the moniegar or the rent collector of the Mitta and Exhibit XII dated the 18th day of December 1888 in Appeal

Against Order No. 105 of 1902 is the lease patta given by the decree-holder to the Moniegar for fasli 1298 reserving a net rent of Rs. 1,300, the mittadars—the judgment-debtors—standing as sureties for payment of the rent by the lessee with interest thereon at 18 *per cent. per annum*.

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All the future complications in the case are chiefly due to the sanction which was so irregularly accorded on the 19th day of December 1888 to the alleged agreement and to attempts made to execute the decree as if the same could be varied by the subsequent agreement. On more occasions than one it has been judicially determined in execution proceedings both by the District Court and by the High Court on appeal that the order of the 19th day of December 1888 can operate only as a sanction accorded to the agreement as embodied in the power of attorney and the petition presented by the judgment-debtors on the 17th day of December 1888 and that the agreement of the 18th day of December 1888 cannot be regarded as one sanctioned by the Court. Such determination has become final. In pursuance of the agreement entered into between the decree-holder and the judgment-debtors subsequent to the decree, the decree-holder appears to have been in some sort of possession or other between December 1888 and January 1893 when at the instance of the judgment-debtors a receiver was appointed by the Court to take possession of the Mitta as the decree-holder failed to pay the peishcush.

In A. A.O. No. 105 of 1902, it is urged on behalf of the appellants—judgment-debtors—that the execution of the decree in O. S. No. 12 of 1886 is barred by limitation and also that the decree has been satisfied by the rents and profits realized or which ought to have been realized by the decree-holder during the time he was in possession of the Mitta as aforesaid and I now proceed to consider the question arising in this appeal.

The first paragraph of S. 257-A, Civil Procedure Court relates to an agreement by which the decree-holder undertakes to give time to his judgment-debtor, for the satisfaction of the judgment debt. The second paragraph relates to an agreement made for the satisfaction of the judgment-debt when such agreement secures to the decree-holder either directly or indirectly payment of any

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sum in excess of what may be payable under the decree. In regard to both these agreements the section enacts that such agreements shall be *void* unless made with the sanction of the Court which passed the decree and it is indicated that the Court is to accord its sanction only if it deems that the consideration for such agreement is under the circumstances reasonable and not oppressive or unconscionable. The policy of the section is clear and the provision therein made is really in the nature of a rule of substantive law which, however, is enacted in the Procedure Code inasmuch as it is connected with execution of decrees and the object is to debar a decree-holder from using the process of Court though lawfully as an instrument of oppression and entering into unconscionable bargains with the judgment-debtor in consideration of his postponing the process of execution or otherwise agreeing for the satisfaction of the decree and it is hard to conceive of a stronger and more appropriate legal expression than the word '*void*' to give full effect to such policy. The whole object would be defeated by construing the section as rendering such an agreement (unless it has received the sanction of the Court) "*void*" only for purposes of execution of the decree but efficacious for securing to the decree-holder the benefit of the oppressive or unconscionable bargain if he brings a suit. Such construction of the section not only frustrates the object of the Legislature by importing into the section the words "for purposes of execution of the decree" which do not exist there but proceeds also upon a misapprehension that the agreement referred to, if sanctioned by the Court, is to be regarded as incorporated into the decree and the decree executed as thus varied or added to. This is entirely opposed to the whole scheme of the Procedure Code and to its express provisions. If the agreement that receives the sanction of the Court is one for the satisfaction of the judgment-debt and payments made in pursuance thereof are certified or recorded as certified under S. 258, Civil Procedure Code, there can be no further proceedings for execution of the decree and the agreement so far as it provides for the payment of any sum in excess of the decree amount can be enforced only by a separate suit and if the agreement which receives the sanction of the Court be one for giving time for the satisfaction of the judgment-debt under the first paragraph of S. 257-A, Civil Procedure Code the only efficacy it can have in *execution proceed-*

ings will be to obtain an order under the concluding portion of clause (c) of S. 244, Civil Procedure Code for stay of execution until the expiration of the time stipulated in the agreement and if the consideration for such agreement be a promise made by the judgment-debtor to pay interest not provided for by the decree or a higher interest than that provided for by the decree or a certain sum in addition to the amount decreed, the decree-holder cannot seek to realize such interest or additional sum in execution of the decree but can recover the same only by bringing a suit upon the agreement. A reference to Ss. 210 and 375A, Civil Procedure Code will show that this is the correct view and that it is not competent to the Court which passed the decree to vary it or add to it even if both the parties agree to such variation or addition except in the solitary instance referred to in paragraph 2 of S. 210, Civil Procedure Code, or even without such agreement for the purpose of bringing the decree into conformity with the judgment under S. 206, Civil Procedure Code. The Judicial Committee of the Privy Council strongly animadverted upon a variation of the decree made by the High Court in pursuance of a compromise entered into by the parties after the decree with a view to withdrawing an appeal to His Majesty in Council and held that such variation of the decree must be treated as made *ultra vires* in determining whether the execution of the decree was or was not barred by the law of limitation (*Kotagiri Venkata Subbanima Rao v. Vellanki Venkata Rama Rao*<sup>1</sup>).

An agreement of the kind contemplated by paragraph 2 of S. 257A, Civil Procedure Code, will be perfectly valid as the basis for a suit even if it has not received the sanction of the Court, provided it does not secure to the decree-holder either directly or indirectly payment of any sum in excess of the amount due or to accrue due under the decree. The agreement will operate as a bar to the execution of the decree if it be certified or recorded as certified under the provisions of S. 258, Civil Procedure Code, and it can be enforced by a suit. The last paragraph of S. 257A, Civil Procedure Code, is significant of the sense in which the word 'void' is used in the first and second paragraphs (*Cf.* S. 65 of the Indian Contract Act). It provides that in cases in which the decree-holder evades the provisions of paragraphs 1 and 2 and

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receives from the judgment-debtor in pursuance of an agreement which has not received the sanction of the Court any sum in excess of the decree amount or any sum not provided for by the decree, either in satisfaction of the judgment-debt or for giving time for the satisfaction of the judgment-debt, the judgment-debtor may apply to the Court for the recovery of such excess payment or for crediting toward the decree amount any sum paid as a consideration for postponing execution. In the case of payment made or received in pursuance of an agreement sanctioned by the Court under paragraph 2 of S. 257A, Civil Procedure Code, such payment can be recognized by the Court executing the decree only if it be certified or recorded as certified under S. 258, Civil Procedure Code.

Applying the above principles to the execution of the decree in O. S. No. 12 of 1886 and assuming as it must be that the agreement of the 17th day of December 1888 as embodied in the power of attorney and the petition presented to the Court had been sanctioned by the Court and rightly so, such agreement must be regarded as a conditional agreement falling under paragraph 1 of S. 257A, Civil Procedure Code. Paragraph 3 of the petition provides for the satisfaction of the judgment-debt by entitling the decree-holder to receive from the moniegar all collections made by him from time to time from the Mitta until the decree amount should be liquidated. So far, the agreement does not secure to the decree-holder any sum in excess of the decree amount payable under the decree and is not obnoxious to S. 257A, Civil Procedure Code, even if it had not received the sanction of the Court. But it is provided in paragraph 4 that in the event of the decree-holder experiencing any difficulty, obstacle or hindrance in realizing the rents and profits of the Mitta in the manner contemplated in paragraph 3, the decree-holder is to be at liberty to apply for execution of the decree claiming interest at 24 *per cent.* instead of 'at 18 *per cent.* the rate mentioned in the decree without giving credit to any payment that he may have received through the moniegar in the meanwhile. The effect of this provision in paragraph 4 is to give the judgment-debtor time for the satisfaction of the decree and the consideration for postponement of the execution of the decree until the happening of the contingency mentioned in paragraph 4

must be taken to be the payment of the additional interest of 6 *per cent.* and the benefit accruing to the decree-holder by his being allowed to appropriate to himself all payments which he may have in the meanwhile received from the moniegar under paragraph 3. If the arrangement contemplated by paragraph 3 had continued until the liquidation of the decree debt the payments received from the moniegar from time to time would operate only as payments made out of Court and that would be so whether or not the agreement under which the same was made is one which needed the sanction of the Court under paragraph 2 of S. 257A, Civil Procedure Code. Such payments cannot be recognized by the Court executing the decree unless certified or recorded as certified under S. 258, Civil Procedure Code. But if the decree is sought to be executed under paragraph 4 as it has now been sought to be executed the question of payments received in the meanwhile by the decree-holder from the moniegar becomes irrelevant as the decree-holder is entitled to appropriate such payments to himself without crediting them towards the decree. If however the decree had been fully satisfied under paragraph 3 before the contingency contemplated by paragraph 4 happened, it would be a breach of contract on the part of the decree-holder to apply for execution under paragraph 4, but if nevertheless he does so apply the judgment-debtor cannot resist execution unless within the time prescribed by Article 173A of the Indian Limitation Act he has taken the necessary steps for having such payments recorded as certified under S. 258, Civil Procedure Code. The decree-holder, however, in his present application for execution (E. P. No. 26 of 1901) does deduct from the decree-amount the sum of Rs. 3,768-4-9, which he admits as having been realized by him from the rents and profits of the Mitta including two payments made to him under the orders of the Court by the Receiver (vide Exhibits B and C in Appeal No. 69 of 1900) though in his previous application he did not credit the judgment-debtors with that amount.

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On behalf of the judgment-debtors, it was contended before the District Judge and before us in appeal that the decree should be held to have been satisfied by the rents and profits actually realized or which ought to have been realized from the Mitta by the decree-holder between December 1888 and January 1898

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during which period it is alleged he was in possession as usufructuary mortgagee and this question appears to have been raised by the judgment-debtors as early as 1892 and again in 1898 though on both those occasions the matter appears to have been dropped by reason of their failure to deposit the Commissioner's fee. The District Judge, however, has now investigated the matter and come to the conclusion that Rs. 3,343-7-9 represents approximately the amount actually received by the decree-holder but as the decree-holder admits having received Rs. 3,768-4-9 the District Judge adopted that figure. Under the agreement of the 17th day of December 1888, it is clear that the decree-holder cannot be regarded as a usufructuary mortgagee of the Mitta, at the most he is only an assignee of the rents and profits which the moniegar may collect from time to time and he cannot be charged with the liabilities and responsibilities of an usufructuary mortgagee of the Mitta. The matter no doubt has been complicated by the fact that the decree-holder obtained a usufructuary mortgage of the Mitta on the 18th day of December 1888 and acted on the supposition that that also was sanctioned by the Court on the 19th day of December 1888 along with the agreement of the 17th day of December 1888. Such possession therefore as he had of the Mitta until January 1893 was as a matter of fact principally on the strength of the usufructuary mortgage bond which, however, strangely enough, provided that pattas and muchilikas were to be exchanged with the ryots by the mortgagors—the judgment-debtors themselves, and not by the mortgagee—the decree-holder, and it was also provided therein that the judgment-debtors were to render every aid to the decree-holder in the collection of rents and profits. The decree-holder was to enjoy the rents and profits in lieu of interest for the decree-amount inclusive of interest and costs and it was stipulated that the amount of the decree should be paid within five years. If the agreement entered into under this usufructuary mortgage secures to the decree-holder payment indirectly of any sum on account of interest in excess of the interest due under the decree, it will be void under paragraph 2 of S. 257A, Civil Procedure Code, as it must be taken not to have been sanctioned by the Court and if any such excess amount has in fact been realized by the decree-holder that will have to be credited towards the decree amount under the last paragraph of

S. 257A, Civil Procedure Code. But it has not been contended, and there is nothing to show, that the mortgage deed secures to the decree-holder either directly or indirectly payment of any sum in excess of the sum due or to accrue due under the decree. Even on the assumption that the mortgage deed is not void for want of sanction, I am satisfied for the reasons given by the District Judge and especially in view of the undertaking by the judgment-debtors to exchange pattas and muchilikas with the royts and to render all assistance to the decree-holder in the collection of rents and profits that the decree-holder cannot be justly charged with anything more than the amount admitted by him and it is, therefore, unnecessary to consider and determine whether the judgment-debtors can plead satisfaction of the decree in the manner alleged by them and if not whether in view of the 90 days' period of limitation prescribed by article 173 A of the second schedule to the Indian Limitation Act they can be regarded as having set the Court in motion in time to cause the alleged payment to be recorded as certified under the second paragraph of S. 258, Civil Procedure Code. As already observed (both in the agreement of the 17th day of December 1888 and in the mortgage deed of the 18th day of December 1888) it is provided that in the event of the decree-holder experiencing any difficulty, obstacle or hindrance in realizing the rents and profits of the Mitta, he is to be at liberty to apply for execution of the decree without giving credit for the amounts already realized. Though it may be that the decree-holder cannot claim this benefit under the mortgage deed of the 18th day of December 1888 it does not follow that he cannot claim this benefit under the agreement of the 17th day of December 1888 which has been sanctioned by the Court. As however he has in his last execution Petition (No. 26 of 1901) credited the judgment-debtors with this sum no question has been raised as to whether in the events which have happened he could claim the benefit of this sum under paragraph 4 of the petition without crediting it towards the decree amount.

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The question of limitation which is raised as a bar to the execution of the decree is not dealt with by the District Judge in his judgment, dated the 31st July 1902 (wrongly described as order) in Execution Petition No. 26 of 1901 now under appeal. It would appear from paragraphs 31 and 32 of the judgment that the execu-

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tion petition has been finally granted so far as it prays for the attachment of certain immovable properties of the judgment-debtors though apart from the judgment no formal order to that effect has been passed, as it ought to have been. The question of limitation appears to have been decided in favour of the decree-holder by an interlocutory judgment (wrongly styled "order"), dated the 7th April 1902 passed on Execution Petition No. 26 of 1901. Though a copy of this judgment is not a part of the records sent up to this Court, a certified copy of it has been produced before us at the hearing by the respondent's pleader, and though there was no appeal preferred against it by the judgment-debtors, it ought in my opinion to be regarded simply as the recording of a finding on one of the issues arising in connection with the execution application before passing a final order on the petition after deciding the remaining issues. The appellants, therefore, are not precluded from raising the question of limitation in this appeal which they have now preferred against the final order. The question of limitation has, therefore, now to be decided in the appeal. It will be remembered that the date of the decree in O. S. No. 12 of 1886 is the 22nd November 1887. The first application for execution, E. P. No. 535 of 1888 was presented on the 24th September 1888; it is not denied that that was in accordance with law. The application was granted and the property mortgaged was apparently advertised for sale on the 17th day of December 1888 on which day the sale was adjourned to the 19th and on the latter date it was stopped in pursuance of the arrangement which was sanctioned on that date. The second application was Execution Petition No. 7 of 1890 which was presented on the 20th June 1890 but that was dismissed and rightly dismissed as the relief thereby sought was the recovery from the judgment-debtors of the sum of Rs. 5,000 for an alleged breach by the judgment-debtor of the agreement sanctioned by the Court on the 19th day of December 1886. It is impossible to regard this application as in any sense an application for the execution of the decree made in accordance with law within the meaning of clause 4 in third column of Article 179 of the second schedule to the Indian Limitation Act. The third application, Execution Petition No. 52 of 1891 was presented on the 7th December 1891 which is more than three years from the date of first application, viz., the 24th September 1888 but within three years from the 17th December 1888. If the making of an application under S. 257 A, Civil Procedure Code, is

the taking of some step in aid of execution of the decree by obtaining the Court's sanction to an agreement entered into for the satisfaction of the judgment-debt, Execution Petition No. 52 of 1891 would be one made within time in accordance with law. The contention that this application could not be regarded as one made in accordance with law, because the decree-holder claims the decree amount as settled by the mortgage bond, dated the 18th December 1888, on the footing that that was sanctioned by the Court is manifestly untenable; but in my opinion the petition of the 17th December 1888 cannot be regarded as an application made to take some step in aid of the *execution* of the decree. The application, Execution Petition No. 32 of 1894 was presented on the 7th November 1894 which is within three years from the date of Execution Petition No. 52 of 1891 and the decree-holder therein sought to realize the amount of the decree by executing it personally against the judgment-debtors by attaching under S. 273, Civil Procedure Code., the decree for money in Original Suit No. 11 of 1893 which the judgment-debtors had obtained against a third party for payment of Rs. 10,000. The decree-holder also prayed that he might be put in possession of the mortgaged properties for being enjoyed in lieu of interest on the decree amount in accordance with the mortgage bond of the 18th December 1888. The Court on the 17th November 1894 issued an order attaching the decree and gave notice to the judgment-debtors in regard to the remaining portion of the application and on the 29th March 1895, the petition was dismissed for default of decree-holder's appearance. This petition must also be regarded as one made for execution of the decree in accordance with law and the prayer contained in it for attachment of the decree was actually granted though it may be that the decree-holder was not entitled to certain other reliefs claimed in the petition. The fifth application No. 61 of 1895 was presented on the 28th November 1895 praying among other things for sale of the mortgaged properties. This was dismissed as barred by limitation on the 10th November 1896 (Vide Exhibit IV in Appeal No. 69 of 1900). Against that order an appeal was preferred to the High Court in A. A. O. No. 47 of 1897 and on the 16th February 1898 the order appealed against was reversed and the Execution Petition No. 61 of 1895 was remanded for being dealt with afresh, even the question of limitation however not having been finally disposed of. Before E. P. No. 61 of 1895 was reheard on remand the present application for execution of the

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decree (E. P. No. 26 of 1901) was presented apparently as a continuation of E. P. No. 61 of 1895 with a prayer for certain additional remedies for the execution of the decree. It is, however, impossible to uphold the view of the District Judge as expressed in his finding dated the 7th April 1902, already referred to that the order passed on the 24th November 1899 on E. P. No. 58 of 1897 presented by the judgment-debtors for recovery of costs awarded to them by the decree in O. S. No. 12 of 1886 in which the Subordinate Judge held that the execution of the decree by the decree-holder was not barred by limitation operates as *res judicata* in favour of the decree-holder notwithstanding that the Subordinate Judge rightly or wrongly permitted the judgment-debtors to withdraw their Execution Petition No. 58 of 1897. Under such circumstances the so-called decision of the Subordinate Judge is no more than an expression of his opinion on the question of limitation and such an opinion cannot of course operate as *res judicata*. I am however of opinion that the orders passed by the District Judge on Civil Miscellaneous Petition No. 164 of 1897, dated the 29th September 1897, on C.M. P. No. 598 of 1897, dated the 5th January 1898 (*vide* Exhibits B and C in appeal No. 69 of 1900) operate as *res judicata* in favour of the decree-holder on the question of limitation. Both those orders, or, at any rate, the first mentioned of them was passed after giving notice to the judgment-debtors and hearing their Vakils. By virtue of those orders the decree-holder recovered from the hands of the Receiver two sums of Rs. 600 and Rs. 468-4-9 in part satisfaction of the decree and those orders became final not having been appealed against. If the execution of the decree had been barred, the decree-holder could not have been entitled to receive payment of the said amount from the hands of the Receiver towards the satisfaction of the decree. It is, therefore, unnecessary to consider and decide the question of limitation independently of these two orders. The appellants have not taken any objection to the rate of interest claimed in the execution petition which is 6 *per cent.* higher than that provided by the decree or to the amount claimed as payable under the decree. The A. A. O. No. 105 of 1902, therefore, fails and I would dismiss the same with costs.

In A. A. O. No. 109 of 1902, the only question raised is whether the assignment of the decree in O. S. No. 11 of 1893 in favour of the appellant by the decree-holder therein who were

judgment-debtors in O. S. No. 12 of 1886 will prevail against the attachment of the decree under S. 273, Civil Procedure Code, such attachment having been made in execution of the decree in O. S. No. 12 of 1886 prior to the assignment of the decree in O. S. No. 11 of 1893. As already stated the attachment was made by order of the court, dated the 17th November 1894, passed on E. P. No. 32 of 1894. It is contended that because the execution petition which contained also other prayers was dismissed on the 29th March 1895 for default of the decree-holder's appearance, such dismissal operates in law as withdrawal of the attachment which had already been made and that, therefore, the subsequent assignment of the decree in favor of the appellant is valid as against the attaching creditor. It is not alleged that the notice of attachment has been cancelled or withdrawn and it is difficult to see on what principle it can be held that the attachment was not subsisting at the date of the assignment of the decree. The order of the District Judge is, therefore, right and I would dismiss A. A. O. No. 109 of 1902 with costs.

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A. No. 69 of 1900 is prosecuted only against the 1st and 2nd respondents, it having been already withdrawn on the 4th September 1901 so far as the 3rd and 4th respondents are concerned to whom no notice had been served. From the Memorandum of Appeal their names will be struck out. The suit out of which this appeal has arisen has already been referred to. It was brought on the footing that the plaintiff is the usufructuary mortgagee of the Mitta by virtue of the agreement embodied in the petition of the 17th day of December 1888 and also by virtue of the registered deed of mortgage dated the 18th day of December 1888 which is marked as Exhibit A in the case. The petition of the 17th day of December 1888 was, however, not exhibited in this suit and I think that the omission was intentional it being clear that under that document he cannot be regarded as a usufructuary mortgagee of the Mitta entitled to maintain the suit in ejectment. It is now tendered as additional evidence in the appeal and even if it be admitted it will make no difference whatever in the result, and it is therefore rejected.

Among the various issues recorded in the case the seventh issue runs as follows :—" is plaintiff debarred from claiming possession by the subsequent application to execute the decree in O. S. No. 12



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of 1886." This issue is considered by the Subordinate Judge in paragraph 21 of this judgment and judging from the reasons given by him which, however, it is difficult to follow, it is evident he meant to decide this issue against the defendants though in terms he records a finding on this issue in the affirmative and by implication therefore in favor of the defendants. The arguments in the appeal were in the first instance confined to this issue and as our finding on this issue is fatal to the maintainability of the plaintiff's suit, the appeal has not been argued in regard to the other questions raised in the appeal. It is clear from the mortgage deed Exhibit A, the operative portion of which is above set forth, that the plaintiffs cannot seek the double remedy of executing the decree in O. S. No. 12 of 1886 and also of recovering possession of the mortgaged property. Under Exhibit A, the plaintiff—decree holder—has reserved his full right to enforce execution of the decree both personally against the judgment-debtors and also by sale of the mortgaged property if he should incur any loss or experience any obstruction or hindrance in his enjoyment of the Mitta as usufructuary mortgagee in lieu of interest on the decree amount. It may be that even if such loss, hindrance or obstruction takes place, he may instead of enforcing execution of the decree, enforce his right to remain in possession of the mortgaged property undisturbed or recover possession thereof by a suit if necessary, if he be dispossessed before the decree amount is paid to him and in this sense the recovery by way of enforcing the decree by execution would be only a cumulative remedy and would not preclude him from maintaining his position as usufructuary mortgagee instead of falling back upon his right to apply for execution of the decree. Such possession as he had under the mortgage deed was more or less hindered and obstructed from the very beginning and he completely lost it in 1893 when at the instance of the judgment-debtors a Receiver was appointed. Under the terms of the mortgage deed he was entitled to apply for execution of the decree in the events which have happened and he accordingly applied for execution of the decree in Execution Petition No. 32 of 1894, which was partially granted so far as the attachment of the decree in Original Suit No. 11 of 1893 was concerned and in Execution Petition No. 61 of 1895 and Execution Petition No. 26 of 1901 in continuation of the latter. These petitions were presented and substantially granted by the District Court before he brought this suit on the 16th December 1898 and the orders of the District

Judge have also this day been confirmed by this Court in A. A. O. Nos. 105 and 109 of 02. It is, therefore, clear that this suit to recover possession as usufructuary mortgagee of the Mitta in question cannot be maintained and the suit ought to have been dismissed at the first hearing on this simple ground. It is, therefore, unnecessary to consider the other issues involved in the case and I would dismiss the appeal with costs.

BENSON, J.—I concur throughout.

### IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Chief Justice*,  
and Mr. Justice Smbrahmania Aiyar.

Venkatasami Pillai ... Appellant\* (*Plaintiff—judgment-debtor*).  
v.  
Kuppayee Ammal and others. Respondents (*Petitioner—1st Def'ts. Judgment-creditors*).

*Decree in favor of a Manager—Decree reversed on appeal—Restitution—Personal liability of manager.*

Where the manager of a temple obtains a decree for payment of money and after realizing the same in execution pays the sum so realized to the temple committee, but the original decree is reversed on appeal, restitution cannot be enforced against him by arrest.

The private property of an individual cannot be taken in execution of a decree against him in his capacity as manager or trustee of a temple (except in respect of a liability arising by his breach of trust) just as the property of the temple cannot be taken in execution where the decree against him is in respect of his personal debt.

Appeal from the order of the District Court of Trichinopoly, in E. P. No. 309 of 1903 in O. S. No. 28 of 1898 on the file of the Subordinate Judge's Court of Trichinopoly.

The facts are as follow :—One Venkatasami Pillai as the trustee of Thirunedungulam Devastanam brought O. S. 28 of 1898 on the file of the Subordinate Judge's Court of Trichinopoly against the first defendant, an ex-trustee, and two others (lessees) for the recovery of Rs. 4,000 and odd collected by the first defendant from the lessees due to the temple and misappropriated by the first defendant. The Sub-Judge gave him a decree as claimed in the plaint against the first defendant. The first defendant then filed an appeal in the High Court against the decree of the Sub-Judge and died pending the appeal. His widows, Kuppayee and two others then prosecuted the appeal. On appeal the High Court modified

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the decree of the Sub-Judge by allowing the plaintiff a sum of Rs. 80 only as there was no evidence of other sums as having been collected and misappropriated by the first defendant. The plaintiff executed his decree of the Sub-Court while the appeal was pending and handed the same over to the President of the Devasthanam committee. The first defendant's representatives then applied in execution of the decree of the High Court to get back the amounts paid by the first defendant in execution of the decree of the Sub-Court by arrest and imprisonment of the judgment-debtor.

*T. Natesa Aiyar* for appellant.

*T. Rangachariar* and *T. V. Muthukrishna Aiyar* for respondents.

The Court delivered the following

**JUDGMENT:**—In this case the plaintiff sued as manager of a temple, and he is so described in the decree which he obtained. On payment being made to him in pursuance of the decree he handed over the proceeds to the temple committee. On appeal, the plaintiff's decree was reversed, an order for restitution was made, and on the failure of the plaintiff to make restitution, an application was made for execution of the order by his arrest.

The decree was obtained by the plaintiff in his representative capacity as trustee, and the order was made against him in his representative capacity. Trust property cannot be taken in execution, where the decree is against a person who is a trustee if the debt in respect of which the decree is obtained is a personal debt. Conversely the private property of an individual cannot be taken in execution of a decree against that individual in his capacity as a trustee, excepting, of course, in a case where the liability arises from a breach of trust on the part of the trustee. Here there is no question of a breach of trust by the trustee.

The order of the District Judge, in so far as it authorizes the arrest of the plaintiff by way of execution of the restitution order must be set aside.

As regards the memo of objections the defendants are entitled to interest at the rate of 9 per cent. from the date of payment by them under the decree.

The costs of this appeal must be paid by the defendants.

The costs of the memo of objections must be paid out of the trust fund.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar  
and Mr. Justice Sankaran Nair.

Vythilinga Mudaliar .. Appellant\* in both the cases (*Plaintiff*).

v.

Ramachendra Naicker ... Respondent in both the cases (*Defendant*).

*Mohini Arrangement by Government—Temple to receive assessment—Effect of arrangement—Res Judicata—Certainty of estoppel—Decision in a suit for one fasli how far binding in suit for subsequent fasli.*

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Where in lieu of Mohini allowance payable to a temple by the Government the liability of the temple to pay assessment on certain lands was released and for the balance, the Government directed the first crop assessment payable on certain lands by defendant's ancestors to be paid to the temple and the defendant's ancestor executed an undertaking to Government to pay such assessment to the temple and the trustees of the temple also executed Muchilika to Government agreeing to receive the assessment in satisfaction of their claims for mohini, the claim of the temple for such assessment was not based upon any contract between the temple and the choultry in respect of any possession by the latter of lands. It was a claim to enforce the liability upon property as by the arrangement the lands, the revenue of which was assigned to the temple, became *inam* lands vested in the latter who became entitled to the *melwaram* on such lands.

In a former suit the temple sued the defendant for the *melwaram*. The defendant contended that he was not liable as he was not in possession of so much of the lands as was believed to have been in the possession of the defendant's ancestor at the time of the arrangement. The plaintiff's claim was decreed by the Munsif on the ground that the defendant should seek his remedy from Government and the Sub-judge confirmed this decree upon the ground that the defendant was precluded from raising his contention by reason of the payments made by his family for a long time upon the whole extent. In second appeal, the High Court held that they "saw no reason to differ from the courts below".

In a second suit by the trustees for the *melwaram* due for different faslis the same contention was raised but the plaintiff pleaded that it was *res judicata* by the former decision.

*Held* (1). that in order to sustain a plea of *res judicata* what was relied upon as estoppel must be certain.

(2). that where the first court based its decision upon one ground and the second court upon different and inconsistent ground and the third court simply affirmed the decision of both the courts the decision was uncertain and it would be impossible to say what exactly was decided.

(3). that the decision in the former litigation was not *res judicata* and the defendant was entitled to raise his contention.

(4). that, even apart from this, a decision in a suit for *melwaram* of one fasli would not estop the defendant who was sued for *melwaram* for subsequent faslis from contending that he was not in possession of the lands in respect of which *melwaram* was

\* A. A. O. Nos. 7 and 8 of 1904.

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claimed and that as such he was not liable although he might have raised the same contention in the suit for the previous fasli and the melwaram was decreed against him and although the defendant might not allege that the lands had gone out of his possession subsequent to the previous suit.

A payment made to the temple for a long series of years upon the footing that the defendant and his family had the same extent of lands as they were supposed to possess at the time of the arrangement would not bar the defendant and his family from showing that they had not such extent even at the time of the original arrangement.

Appeals from the orders of the Subordinate Judge's Court of Tanjore in A. S. Nos. 523 and 553 of 1903, presented against the decrees of the District Munsif's Court of Negapatam in O. S. Nos. 198 of 1902 and 196 of 1901.

*V. Krishnaswami Aiyar, K. Srinivasa Aiyangar and T. V. Gopalasami Mudaliar* for appellant.

*C. Ramachandra Rao Saheb* for respondent.

The Court delivered the following

**JUDGMENTS :—**SUBRAHMANIA AIYAR, J.—Sowrirajaperumal temple of Tirukkannapuram in the Nannilam Taluq of the Tanjore District, was entitled to receive from the Government an annual money allowance spoken of as *Mohini*. This allowance used to be disbursed from the Public Treasury till 1863. In that year the Government made another arrangement with reference to the allowance. The temple itself having owned in different villages ryotwary lands liable to pay to Government a total assessment of Rs. 705-9-2, the institution was exonerated from the liability to pay this assessment and the liability of the Government to pay the allowance to the temple was *pro tanto* put an end to. With reference to the remainder of the allowance the assessment due to Government in respect of certain ryotwary lands in four villages was directed to be paid over thereafter to the trustees of the temple. Sami Naik who was taken to be the then holder of these lands executed a Muchalika to Government undertaking to pay the assessment to the temple. The trustees of the temple also executed a muchalika to Government agreeing to receive the assessment due upon the lands referred to in satisfaction of the claim the temple till then had on the Government. No writing passed between the trustees on the one hand and Sami Naik on the other. But ever since, payments as contemplated under the arrangement were made by Sami Naik or his successors up to the last revision of settlement in the District.

The present litigation is in respect of moneys claimed to be due to the temple from the defendant Ramachandra Naik, grandson of Sami Naik, who in one of the Suits (O. S. No. 196 of 1901) is impleaded in his character of trustee of the Enangudi Choultry founded by Sami Naik and endowed with 10 velis and odd of land belonging to him in one of the said four villages, while in the other (O. S. No. 198 of 1902) he is impleaded as holding in his own right part of the lands the revenue of which is alleged to have been assigned over to the temple. In the first of these suits the plaintiff claims Rs. 182-9-7 as the amount payable per annum by the choultry for 3 faslis from 1307, and in the other Rs. 219-11-8; payable per annum by Ramachandra Naik personally for the three faslis from 1308. Various contentions of law and fact were raised in the written statements, but only one point has at this stage to be considered, *viz.*, whether the trial of the contention as to the extent actually in the possession of the defendants in the respective suits out of the lands the right to the revenue whereof was granted to the temple, is barred by the decision in two previous suits (O. S. No. 370 of 1897 and O. S. No. 50 of 1899) brought on behalf of the temple against the choultry and Ramachandra Naik respectively, for the recovery of sums claimed to be due on account of three faslis prior to the periods in question in the present suits.

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It will be sufficient to deal with the suit against the choultry, as the decision of the question in the other suit practically follows this. Mr. Krishnaswamy Aiyar on behalf of the plaintiff, if I understood him rightly, suggested that the plaintiff's claim is on a contract between the temple and the choultry under which the choultry is bound to pay to the temple a fixed sum of Rs. 182-9-7 per annum, without reference to the question of the possession of the *Muhini* lands by the choultry or the extent thereof actually in its hands. This suggestion is altogether unwarranted by the plaint as the following extracts therefrom, which state the nature of the claim, will show:—

“3. On 26th November 1863, defendant's paternal grandfather Sami Naicker executed a Muchalika to Her Majesty's Government stating that he would pay to the said (Sowrirajaperumal) temple from fasli 1273 the sum of Rs. 1,117-5-8 being the *thirva* (exclusive of Kaval income) of 47 velis 18 *mahs* 47,  $\frac{2}{3}$  +  $\frac{1}{4}$

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gulis of lands in the four villages of Pandaravadi Puliakudi &c., in Nannilam Taluk, just as he had been paying to the Sircar. Under the agreement relating to charity and the partition deed, executed in the family of the said Sami Naicker, 10 velis 18 mahs 62½ gulis in Pandaravadi Puliakudy village out of the lands mentioned in the said muchalika, has been assigned to the charity-choultry in Enangudi which was under the management of the said Sami Naicker. So long as the said Sami Naicker was living he was paying to the temple Rs. 182-9-7 the balance of the thirva exclusive of 5 per cent remitted for vicissitudes of season out of Rs. 192-3-5 the thirva proportionate to the said lands. After his death his son Venkatasubba Naicker was paying the said thirva to the plaintiff on account of the temple.

“4. After the death of the said Venkatasubba Naicker, his son and heir, the defendant, who had been conducting the said charity, has paid to the plaintiff for the temple the said thirva in full for Fasli 1303. He paid a portion for Fasli 1304 and did not pay the balance.

“5. Plaintiff sued the defendant in O. S. No. 370 of 1897 in this Court in respect of the balance due for the said Fasli 1304 and the sums due for Fasli 1305 and 1306 and on the defence of the defendant, decree was passed in favour of the plaintiff in the Original Suit, Appeal and Special Appeal.

“6. After that he has not paid for 3 Faslis 1307, 1308 and 1309. In spite of demands defendant has been evading payment.”

The claim set forth as above is based entirely on the effect of the arrangement made in 1863 and what was done thereunder, and it is perfectly clear from the provisions of the two muchalikas then executed that the lands the right to the revenue whereof was transferred to the temple, became *Inam* lands vested in the temple. Even without the opening sentences which occur in both the documents, the conclusion as to the nature of the arrangement must, in the circumstances of the case, be as above stated and the express language of those sentences puts the matter beyond all doubt, for those passages show that the arrangement was made in accordance with official orders on the subject of relieving the Government from

the duty of making money allowances to temples by the grant of land revenue as *Inam* in lieu thereof. This being so, the present plaint must be taken to be one for the enforcement of an alleged liability on the part of the choultry to pay rent to the temple upon *Inam* land the melvaram of which is vested in the temple while the Kudivaram is vested in the actual occupant of the land, the choultry. In this view it is obvious that the tenant is not responsible for more than the rent due upon the lands in fact held by him, there being no contract between the parties to pay otherwise. Consequently the choultry is entitled to have the question of the real extent of inam land in its possession during the respective faslis, ascertained and determined ; and this would have to be done even if in the previous suit it had been found as a fact that the choultry was in possession of the whole of the extent alleged in the plaint, for such a finding relating as it did to the occupancy during the faslis then in question could not of course affect the matter of possession in any succeeding year.

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True, it is not alleged on behalf of the choultry that between the period in question in the previous suit and that for the rent of which the present claim is made, any change in the matter of the possession of the inam lands by the choultry has taken place. But this does not preclude the choultry from showing in the present litigation, that, in spite of the conclusions, if any, on the point, arrived at in the previous suit the choultry was in possession of less land than is asserted on behalf of the temple during the years here in question. No doubt had the decision in the previous suit been to the effect that certain specific parcels constituted part of the inam, the choultry in the present suit could not, if it admitted the possession during the period in question here of those parcels, seek to make out that the parcels were not inam. Such, however, is not the nature of the contention.

Even if it were possible to maintain that the view discussed above is erroneous, the plea of *res judicata* urged on behalf of the temple must be held to fail for reasons which I shall now proceed to notice. According to the plaint in the former suit which, except for the period for which the rent was claimed, was identical with the present, the choultry had defaulted to pay the rent due in respect



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of 10 velis and odd of temple inam lands in Pandaravadi Puliakudy village. In the written statement on behalf of the choultry this was in part denied, possession of 7 velis and odd alone out of the inam land being admitted. The written statement further pointed out that the difference between the plaint-mentioned extent and that admitted in the written statement was held by certain individuals (specified in the written statement) ; that the Government in the re-settlement had treated those lands as part of the temple inam and refrained from assessing any revenue thereon on the obvious ground of the liability in respect of the rent of the same being due to the temple; and that though the choultry was in possession of 2 velis and odd of lands exclusive of the admitted 7 velis and odd of inam, the extent over the inam was assessed as ryotwary and the choultry made to pay such assessments to the Government.

With reference to these averments the issue which ought to have been framed was whether the choultry had possession, during the period in question, of any and what extent of temple inam land over and above that admitted in the written statement. But the issue that was actually framed (the 6th issue) ran as follows :—

“Whether defendant is in possession of all the land that was comprised in the endowment to the chuttram and of which the kist was assigned or only of a portion, and if the latter, what is the extent of the portion in his possession in his capacity as manager of the chuttram ?”.

This issue was faulty in more than one respect, for, in the first place, whether the choultry was in possession of the whole of the endowment granted to it or not was foreign to the real dispute between the parties ; and, secondly, it implied that the whole of such endowments were inam lands while that was a moot point. Starting, however, with such a misconceived issue, the trial proceeded and the District Munsif who tried the case purporting to give a finding only on the first part of the issue and in the affirmative, stated his reasons for the conclusion thus:—

“ 7. \* \* \* It is defendant's case that prior to the recent settlement there was no correspondence between putta and enjoyment, that some lands included in his putta as manager of the chuttram were in the actual enjoyment of other persons and *vice versa*, that

nevertheless he paid kist for lands included in his putta though not in his actual enjoyment, as Government did not levy additional kist from him for the lands in his enjoyment but not included in his putta, and that this anomaly was removed by the recent settlement with the result that he is called upon to pay kist not only for the ten velis and odd in his actual enjoyment as manager of the chuttram but also for some lands which prior to the settlement were included in his putta but were not in his actual enjoyment. In fact defendant complains that this is the result of plaintiff insisting on going according to the state of things which prevailed before the settlement and Government, according to the new state of things created by the recent settlement. There seems to be some force in defendant's contention that the *statu quo ante* has been altered since the recent settlement. It is in evidence that defendant is now in possession as manager of the chuttram of the same lands that were in 1865 given as an endowment to it and that his grandfather was in possession of in 1863 when the assignment of revenue was made. His family has not since those years parted with any of them, nor have they acquired any new lands beyond a small accretion of 15 mahs and odd. Exhibit I which is the putta granted to the chuttram before the recent settlement shows that the chuttram paid kist to Government for only these 15 mahs and odd \*\*\*. Exhibit II a patta granted to the chuttram subsequent to the settlement shows that it pays kist to Government for 30 acres 85 cents of land \* \*. The state of things disclosed by Exhibits I and II is also supported by the evidence of defendant and of the kurnam. It also appears from the evidence that some persons are in possession of lands in Puliakudy and that they have not, after the recent settlement, been paying assessment on them either to the temple or to Government.\*\*\*The total extent of such lands appears from defendant's evidence to be about 22 acres. These are probably the lands which defendant says were, prior to the settlement, included in his putta as manager of the chuttram but not in his actual enjoyment. The difference between 15 Mahs and odd for which as seen from Exhibit I defendant paid kist to Government before the settlement and 30 acres 85 cents for which as seen from Exhibit II defendant now pays kist to Government comes to very nearly 22 acres. It would thus appear that if plaintiff's claim for the kist of 10 velis and odd were allowed defendant would have to pay kist for 22 acres twice over.

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Plaintiff has not been able to suggest any reason for this state of things other than that assigned by defendant *viz.*, want of correspondence between putta and enjoyment before the settlement. Defendant has thus a real grievance to complain of but it seems to me that inasmuch as the arrangement evidenced by Exhibits A and B was made by the Government with the trustees of the temple and Sami Naicker on the supposed correspondence of all the lands in Sami Naicker's putta for the village of Puliakudy with those in his actual enjoyment, the present trustee of the temple has no right to insist upon defendant's adherence to that arrangement till it is recast by Government in the light of the facts disclosed in the recent survey and settlement. It is for defendant as manager of the chuttrani to move the Government".

So far as I am able to understand the District Munsif's meaning, his conclusion seems to have been not that the choultry was in possession of the extent of inam land which it contended it had not possession of, but that the choultry, having till prior to the re-settlement been making payments on the footing that it had, the temple was entitled to insist upon the choultry continuing to pay on the same footing until matters were set right by Government whose settlement proceedings had, as he said, the effect of making the choultry pay twice over in respect thereof, that is to say, to the temple on the one hand and to the Government on the other. This conclusion is of course absolutely beside not only the real issue in the case pointed out above but also the issue which was raised. It is impossible to understand how anything done in the re-settlement could have affected the rights and liabilities of the institutions, the temple and the choultry, *inter se* and how those rights and liabilities could be treated as in any way dependent on the action to be taken by the Government in the matter. If the land held by the choultry over and above the admitted 7 and odd velis were the inam of the temple, that institution could not possibly be prejudiced by the Government erroneously classifying it as ryotwary, and the choultry would be bound to pay the temple the assessment thereon in spite of such erroneous classification. If, on the contrary, those lands were not part of the inam but really ryotwary, the claim of the temple was unsustainable. And in either view there was nothing the Government could do

which would touch the relations between the two institutions consequent on the arrangement of 1863. This manifest aspect of the question was somehow completely ignored by the District Munsif.

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Turning next to the findings of the Subordinate Judge who heard the case in appeal, curiously enough it was neither the 6th issue as framed nor the issue which ought properly to have been raised in the suit, that he proceeded to consider. The points for determination were stated by him to be,

“Whether defendant is entitled to be relieved from paying the revenue on lands which he says he is not in possession of, and, if so, how much is to be remitted.”

Paragraphs 9 and 10 of his judgment which are directly devoted to the discussion of the points so raised are as follows:—

“9. All that the defendant's family owned in the village having been endowed to the chuttrum and the revenue on the whole having been undertaken to be paid and paid up to 1893 it lies upon defendant to show how the enjoyment of two velis and odd passed to the other persons named by him and there is not a particle of evidence on this head. The defendant's vakil cannot explain the same at the hearing. The Kurnam examined as defendant's 1st witness confesses that he does not know how enjoyment passed to the others and that two crops assessment on the whole ten velis and odd together with road-cess on the whole is leived from defendant alone. He is a Kurnam of about 11 years standing. It is, therefore, not the concern of the trustee to take cognizance of the arrangement, if any, that defendant has made in respect of enjoyment of portions behind his back and without his express or implied concurrence.

“10. It is said that defendant holds 7 velis and odd of the chuttram land and 30 acres 85 cents of other lands for which he pays revenue to Government and that if he pays to the pagoda for a larger extent than 7 velis and odd he would be paying both to the pagoda and to the Government for the difference. The hardship is not real for the simple reason that the portion which he says he has not got is not what the Court will recognise.”

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The reasoning of the Subordinate Judge is to my mind so deficient in clearness and coherence as to make it impossible for me to say with confidence what precisely he meant to lay down. The ninth paragraph would seem to imply that the choultry having admitted that prior to the resettlement it actually held ten and odd velis of inam land, and having failed to show that two and odd velis thereof got out of its possession the presumption was that the same state of things continued. This would have been somewhat pertinent had he raised as the point for determination the question of *fact*—whether the choultry was in possession of two and odd velis of inam land which it denied it had. But as framed by him the question was apparently one of *law*—whether the choultry could be allowed to aver non-possession as a ground for exoneration in respect of the rent thereof—and his answer to this question in the negative would seem to be contained in the passage :—

“that portion which the defendant says he has not got is not what the Court will recognise.”

The reason for this refusal to ‘recognise’ that the choultry had not, as it asserted, 2 and odd velis of temple inam land in addition to what it admitted it had, was, that prior to the resettlement it had continued to make payments on a contrary footing. Surely such a conclusion was on the very face of it wrong since however much the previous payment may have been evidence in relation to the question whether the two and odd velis of land in the possession of the choultry was or was not *inam*, it was incapable of being treated as anything more than an admission by conduct and could not have barred the choultry’s right to show the truth.

Be this as it may, it is sufficient to note that the ground on which the Subordinate Judge decreed the claim was different from that adopted by the District Munsif and inconsistent with it, since according to the Munsif the liability of the choultry was subject to alteration by what the Government was supposed to be entitled to do on the application of the choultry while according to the Subordinate Judge the choultry was precluded from claiming exoneration under any circumstances.

The case then went on second appeal and that appeal was dismissed, the High Courts observing simply “we see no reason to

differ from the Court below." The findings and conclusions of the Courts below having been different and inconsistent with each other, it could not be taken that this Court meant to express concurrence with such contradictory decisions. The proper view is that the decree in which both the Courts concurred was accepted as right. Being the final decision in the case, from its very nature it cannot operate as an estoppel with reference to the question now in issue, assuming that it was also treated in this Court as in issue then and was discussed before it. The reason is that the decision is wanting in that certainty which is an essential element in the case of every estoppel, the uncertainty consisting in that it does not appear, and in the circumstances, cannot be made to appear, what the precise ground or grounds were on which the affirmation of the decree was in this Court rested—whether that assigned by the District Munsif—or that taken by the Subordinate Judge—or the High Court's own conclusion (if any such were possible at that stage) on the question of fact referred to as properly arising between the parties. The observations of Field, J., who delivered the opinion of the Supreme Court of the United States in *Russell v. Place*<sup>1</sup> are here so pertinent that I quote them at some length. He said :—

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"It is undoubtedly settled law that a judgment of a Court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as for example if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have been passed without indicating which of them was thus litigated and upon which the judgment was rendered—the whole subject matter of the action will be at large, and open to a new contention unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible.

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1. 94 U. S., p. 606 at p. 608.

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" Thus in the case of the *Washington Alexandria &c., Steam Packet v. Sickles*<sup>1</sup> a verdict and judgment for the plaintiff in a prior action against the same defendant on a declaration containing a special count upon a contract, and the common counts, was held by this Court not to be conclusive of the existence and validity of the contract set forth in the special count, because the verdict might have been rendered without reference to that count, and only upon the common counts. Extrinsic evidence showing the fact to have been otherwise was necessary to render the judgment an estoppel upon those points.

" When the same case was before this Court the second time, *Packet Co. v. Sickles*<sup>2</sup>, the general rule with respect to the conclusiveness of a verdict and judgment in a former suit between the same parties, when the judgment is used, in pleading, as an estoppel, or is relied upon as evidence, was stated to be substantially this: that, to render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined,—that is, that the verdict in the suit could not have been rendered without deciding that matter: or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter\* \* \*.

" The record is not unlike a record in an action for money had and received to the plaintiff's use. It would be impossible to affirm from such a record, with certainty, for what moneys thus received the action was brought, without extrinsic evidence showing the fact; and, of course, without such evidence the verdict and judgment would conclude nothing, except as to the amount of indebtedness established.

" According to Coke, an estoppel must 'be certain to every intent'; and if upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded; and nothing conclusive in it when offered as evidence. See *Aiken v. Peck*<sup>3</sup>, and *Hooker v. Hubbard*<sup>4</sup>.

1. 24 Howard.

2. 5 Waller, 580.

3. 25 Vermont 280.

4. 123 Mass. 245.

*Hira Lall v. Ganesha Pershad and others*' is another high authority on the point. There S. B. and M. had sold a taluka to G reserving to themselves a certain portion of that taluka subject to the agreement that they were to pay no rent for the portion reserved nor the Government revenue, but that the Government revenue was to be paid by the vendee. The original vendors sold a part of the reserved property to the plaintiff in the action and the defendants were the vendees from G's widow of what had been sold to G. The plaintiff sought to establish that the agreement between the original vendors and the original vendee was binding on the defendants and that they were bound to indemnify him in respect of the payment of the Government revenue on the reserved property or such portion thereof as he possessed. A judgment which had been previously obtained by the original vendors against the widow of G for possession of the reserved land *exempt from the payment of revenue* was relied on as an estoppel. The Judicial Committee rejected this contention and Sir Robert P. Collier who delivered the judgment said:—

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"The plaintiff is right in contending that this was a suit between the same parties in estate, relating in a great degree to the same subject matter, and in relying on it as far as he can as an estoppel. It remains to ascertain what the real effect of the judgment in that suit was. The claim was "for a declaration of right and proprietary possession exempt from the payment of the rateable rent (by prohibiting the defendant from demanding the rateable revenue)". And the point decided in the Sudder Court is thus stated:—"The Court for the above reasons reverse the decision of the Principal Sudder Ameen, and decree in favour of the appellants for possession of the land exempt from the payment of revenue and *vasilat* to the amount claimed by them."

"It appears to their Lordships that this judgment is ambiguous in one or two respects. It does not appear definitely on the face of it whether it was adjudged that the claim to be indemnified for the payment of Government revenue related to the then impending revenue settlement which the parties may perhaps be assumed



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to have had in contemplation when they entered into the agreement or whether it related to the next settlement or to any subsequent settlement. The judgment might be consistent with either view. Further it does not appear whether the effect of the judgment is simply to render the defendant Mussamat Dulham Begum, liable to indemnify the plaintiffs in respect of the reserved rent, or whether the contract of indemnity is to be taken to run with the land, and to bind all persons who may be hereafter in possession of it under any title whatever. Mussamat Dulham Begum would seem to be the widow of G and thus to have been a representative of the purchaser bound by his undertakings but it would by no means follow that the land is to be bound in whosoever hands it may hereafter come by purchase or otherwise. The judgment thus ambiguous is applied almost wholly to the construction of the *ikrarnamah* which the Court did not look at. If this *ikrarnamah* had been produced in the present suit their Lordships might by applying the judgment to the terms of it have been able to determine the effect of that judgment; but in the absence of the *ikrarnamah* which the plaintiff has not produced and the non-production of which he has not accounted for, their Lordships are unable to construe the judgment in the sense in which the plaintiff seeks to have it construed."

To sum up, my conclusion is, that there was no determination in the previous suit of the question whether the choultry held more of the temple inam land than it admitted then and admits now, secondly, that the decision of this Court owing to the uncertainty as to the ground thereof cannot be availed of as an estoppel in the matter; and thirdly, that even assuming it were possible to show that the question referred to was determined in favour of the appellants with reference to the rent for the period to which that suit related, that would not bar the respondent from raising it again with reference to the period to which the present suit relates

I would therefore dismiss the appeals with costs.

SANKARAN NAIR, J. :—I concur.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Bhashyam Aiyangar.

Ramachandra Aiyar ... Petitioner\* in both  
(Defendant).  
v.

Subramania Chettiar and another ... Respondents in both  
(Assignee of the decree  
and plaintiff).

*Civil Procedure Code S. 232—Right of transferee decree holder—No application merely for recognizing transfer—Application for execution.*

Ramachen-  
dra Aiyar  
v.  
Subramania  
Chettiar.

A transferee decree-holder can only apply to execute the decree under S. 232, C. P. C. He can make no application merely for recognising him as transferee and there is no provision of law requiring the court to recognize the validity of the transfer before the transferee applies for execution.

Petitions under Section 25 of Act IX of 1887 praying the High Court to revise the orders of the Subordinate Judge's Court of Kumbakonam, on *Mis. Application Nos. 1640 and 1639 of 1900* in *Small Cause Suits Nos. 1400 and 1399 of 1891* respectively.

*B. Subrahmanya Aiyar* for petitioner.

*S. Kasturiranga Aiyangar* for respondents.

The Court delivered the following

**JUDGMENT:**—There is no provision of law which requires the Court to recognize the validity of the transfer of a decree before the transferee can apply under S. 232, C. P. C., to execute the decree. The only application which a transferee who, according to the definition of the term decree-holder is himself a decree-holder, can make is an application under S. 232, C. P. C., for execution of the decree and he cannot make an application to the Court merely for recognizing him as transferee of the decree. The revision petitions are dismissed with costs.

\* C. B. P. Nos. 226 and 227 of 1903.

10th November 1903.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir S. Subrahmaniam Aiyar, *Officiating Chief Justice*,  
and Mr. Justice Russell.

S. Ramasami Reddi ... Appellant\* (*Petitioner*).

**Ramasami Reddi,** *Letters Patent S. 15—Judgment in a criminal trial—Security for keeping the peace—Criminal trial.*  
*in re.*

Per Sir Subrahmaniam Aiyar, *Officiating Chief Justice* :—

An order of a magistrate requiring a person to give security for keeping the peace under S. 107 of the Cr. P. C. is a "Criminal trial" and any order passed on appeal or in revision in connection with such a proceeding by a single Judge of the High Court is an order passed in a Criminal trial and no appeal will lie under S. 15 of the Letters Patent.

Per Russell J. :—An order of a single Judge refusing to interfere in revision with an order passed by a Magistrate requiring security to be taken under S. 107 of the Cr. P. C., is not a "Judgment" under S. 15 of the Letters Patent.

Appeal under S. 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Benson in Cr. Rn. Case No. 330 of 1903 preferred against the order of the District Magistrate's Court of Madura, dated 9th February 1903 in D. Dis. 171 of 1903.

Magl.

P. S. Sivaswamy Aiyar for appellant.

The Court delivered the following

**JUDGMENTS :—***The Officiating Chief Justice* :—The petitioner was ordered by the Head Assistant Magistrate of Madura to furnish security for keeping the peace under S. 107 of the Criminal Procedure Code. On appeal to the District Magistrate the order was confirmed. The application for revision of the said order came on before Mr. Justice Benson and was rejected, apparently on the ground that sufficient cause was not shown for the interference of the court by way of revision. The present petition purports to be an appeal against the order of the learned Judge.

The first question is whether an appeal lies in the matter, and it depends upon whether the order as to security is or is not one in a *criminal trial* within the meaning of S. 15 of the Letters Patent. In construing these words, it is scarcely necessary to say that it is not admissible to refer to and rely on the provisions

\* L. P. A. No. 50 of 1903.

30th November 1903.

of the Code of Criminal Procedure to which we were referred in the course of the argument. I do not, however, wish it to be understood that if in interpreting the Letters Patent, reference to the Code of Criminal Procedure were admissible, that would lead to a variation of the conclusion at which I have arrived independently of the Code. Turning now to the Letters Patent there is nothing in S. 15 or in any other section thereof to show that the words 'Criminal' and 'Criminal trial' are used in any other than their general and ordinary sense as used in law. That the proceedings of the Magistrate with reference to the security taken from the petitioner are proceedings in a *criminal* matter or cause admits of no doubt. The very object of the proceeding is the predication of certain crimes about to be committed with reference to the public place, and it is the likelihood of a disturbance of public tranquillity that gives the court jurisdiction. It is obvious that proceedings of this character held before criminal courts can be nothing but criminal proceedings.

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This was, if I understood Mr. Sivaswami Aiyar rightly, hardly denied. What he strongly contended for was that the investigation in question by the Magistrate was not a trial. Now that term according to the passage from the institutes quoted in Wharton's Law Lexicon means "the examination of a cause civil or criminal before a Judge who has jurisdiction over it, according to the laws of the land." The explanation of the same term in *Stroud* on the authority of the observations of *Field J.* in *Guth v. Howarth*<sup>1</sup> is that it is the "conclusion by a competent tribunal of questions in issue in legal proceedings whether civil or criminal." Again in *Bouvier's Law Dictionary* the term is stated on the authority of a decision in Massachusetts to mean "the examination before a competent tribunal according to the laws of the land of the facts put in issue in a cause, for the purpose of determining such issue". These citations express in different words precisely the same idea, and testing the present case with reference to it, but one conclusion is possible. The person before whom the proceedings are conducted is a Judge in every sense of the term; they commence by information laid before him; the law prescribes notice thereof to the accused party; evidence has to be recorded in his presence and judgment given; if the security or bail required to be fur-

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1. 28 S. J. 427; W. N. (84) 99.

Ramasami  
Reddi, *in re.*

nished is not forthcoming, imprisonment follows as a matter of course: finally an appeal is allowed in the matter. If a proceeding involving these requisites and incidents is not a *trial*, it is impossible to see what it is. I have no hesitation, therefore, in holding that the order of the magistrate requiring security was an order in a criminal trial and consequently any order, which may be passed on appeal or in revision in connection with such a proceeding is also an order in a criminal trial. I would accordingly reject this petition.

RUSSELL, J. :—I am of opinion there is no “Judgment” in this case and therefore there is no appeal under S. 15 of the Letters Patent. Vide a decision of a Bench of this Court in Letters Patent Appeal No. 37 of 1903 following previous reported decisions on the same point.

I express no opinion on the question whether the proceedings in the lower Court were a trial or not.

I think the appeal should be rejected.

#### IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Chief Justice*.  
and Mr. Justice Moore.

Mulji Dhanji Seit and another .. Appellants\*  
*v.* (Plaintiffs).

The Southern Mahratta Railway Company,  
Limited, by its Agent and Manager at Dharwar  
and the Madras Railway Company by its Agent  
and Manager at Madras ... .. Respondents.  
(Defendants).

Mulji Dhanji Seit *Railway Company—“Risk Note”—Goods lost in transit—Exemption from liability—*  
*Onus of proof.*

The Southern Mahratta Railway Company. Where goods are carried by a Railway Company under the terms of a “Risk Note” (by which the Railway Company is not liable for any loss, destruction or deterioration of or damage to the goods before, during, or after (transit) the Railway Company is not liable for failure to deliver the goods if they are lost in transit.

If the consignor should assert that the goods were not lost but were delivered to a wrong person, the onus lay upon him to prove his case.

The onus is on the plaintiff (consignor) to show that the circumstances under which the goods disappeared were not such as to amount to "loss" within the meaning of the "Risk Note."

The Railway Company is not bound to show by affirmative evidence that it has lost the goods.

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The Southern  
Maharatta  
Railway  
Company.

Second appeal from the decree of the District Court of South Malabar in A. S. No. 42 of 1901 presented against the decree of the Court of the Addl. District Munsif of Calicut in O. S. No. 220 of 1900.

*J. G. Smith* for appellants.

*C. F. Napier* (with *Barclay, Orr, David, Brightwell, and Moresbey*) for respondent.

The Court delivered the following

**JUDGMENTS:—***The Chief Justice:—*The first question for determination in this appeal is whether on the facts found, the defendant companies are protected from liability by reason of the terms of the special contract described as a Risk Note Form B subject to which the plaintiff's goods were carried by the defendants. The contract is in these terms:—

T. K. Station, 5—10—99.

"Whereas the consignment of 162 bags grain tendered by me (us), as per forwarding order No. 4 of this date, for despatch by the S. M. Railway administration or their transport agents or carriers to Calicut Station, and for which I (we) have received Railway Receipt No. 4 of same date, is charged at a special reduced rate instead of at the ordinary tariff rate chargeable for such consignment. I (we), the undersigned, do in consideration of such lower charge, agree and undertake to hold the said Railway administration, and all other Railway administrations working in connection therewith and also all other transport agents and carriers employed by them respectively, over whose Railways or by or through whose transport agency or agencies the said goods or animals may be carried in transit from Tumkur Station to Calicut Station harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignment from any cause whatever before, during and after transit over the said Railway or other Railway lines working in connection therewith or by any other transport agency or agencies employed

Mulji Dhanji by them respectively for the carriage of the whole or any part of  
Seit  
v. the said consignments.

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Maharatta  
Railway  
Company.

“Signature of Sandu Basappa.”

The first defendant (company) in their written statement admit that 161 bags of raggi and one bag of cholam were received by them from the 2nd plaintiff at Tumkur for carriage to Calicut. They say that the consignment reached Bangalore and was there transhipped into the waggons of the second defendant company. The second defendant company in their written statement deny that the plaintiff's goods arrived at Calicut on October 16th as alleged in the plaint. They admit that a consignment of grain loaded in a waggon the number of which had been changed from 352 to 1327 in accordance with instructions received from the Bangalore City Station reached Calicut, and that the 1st plaintiff's agent claiming the goods in waggon, No. 1327 and producing a receipt note for 162 bags of grain they began to deliver the goods to the plaintiff, that after the delivery to the plaintiff had commenced one Abdul Karim claimed the bags as his, pointing out that they bore his private marks. They say that the Bangalore city station subsequently telegraphed to the Station-master at Calicut that the consignment in Invoice No. 25 (the plaintiff's invoice) had been loaded in waggon No. 352 and not in waggon No. 1327 and that the latter contained the goods of Abdul Karim, and they further say “the consignment under Invoice No. 25 does not appear to have ever arrived at Calicut station.” The receipt note referred to in the written statement is “Railway receipt No. 4 mentioned in the “Risk note.”

The plaintiff's invoice shows that his goods viz., 161 bags of raggi and 1 bag of cholam rice loaded into waggon 352, and the 2nd defendant company appear to admit in their written statement that the original number of the waggon which carried the goods, which were delivered to Abdul Karim at Calicut was 352. It is not stated in the written statement when the number was changed into 1327 or why it was changed and there does not appear to be any evidence on the point. The plaintiff's case as set up in their plaint was that the goods were fraudulently delivered to Abdul Karim by the servants of the second defendant company, but the case of fraudulent delivery does not seem to have been

seriously pressed in either of the lower courts. The lower appellate court finds as a fact that the plaintiff's goods were lost in transit. The onus was on the plaintiffs to prove their case, viz., that the goods which reached Calicut and were delivered to Abdul Karim, were their goods. They failed to do this. S. 76 of the Indian Railways Act, no doubt, provides that in a suit against a Railway administration for loss of goods, it shall not be necessary for the plaintiff to prove how the loss was caused. But the plaintiff's case is that the goods were not lost inasmuch as they were misdelivered and that the company are liable notwithstanding the special contract. We cannot in second appeal disturb the finding of fact of the lower appellate court unless we are satisfied there is no evidence to support it. The evidence adduced on behalf of the defendants by which they sought to prove the circumstances in which the plaintiff's goods were lost, is no doubt meagre and confused, but, seeing that the plaintiffs failed to prove the case upon which they relied, viz., wrongful delivery at Calicut, and that it is admitted that the plaintiff's goods at any rate got as far as Bangalore, I do not think it can be said that there is no evidence to support the finding that the goods were lost in transit.

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The "Risk note" in question in the present case is in the form approved by the Governor-General in Council in accordance with S. 72 of the Indian Railway's Act, 1890 and has been frequently before the courts in this country. See for example the cases reported in *Moheswar Das v. Carter*<sup>1</sup>, *Tippamma v. Southern Maharatta Railway Company*<sup>2</sup>, *Balaram Hun Chand v. S. M. Railway Company*<sup>3</sup>, *East India Company v. Bunyal Ali*<sup>4</sup>, and the decisions are uniform that where a Railway Company carries subject to the terms of the "Risk Note" and fail to make delivery, the Company is exempt from liability. It is, no doubt, difficult to believe that waggon bags, 162 in number, could have been 'lost' in the ordinary acceptance of the term, but when goods are carried subject to the terms of the 'Risk Note' no distinction can be drawn on principle between the loss of the whole and of a portion of the goods. As a matter of fact in the Allahabad case the whole of the consignment was lost.

1. I. L. R., 10 C. 210.

2. I. L. R., 17 B. 417.

3. I. L. R., 19 B. 159.

4. I. L. R., 18 A. 52.



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Company.

It was contended on behalf of other appellants that non-delivery was no evidence of loss and that it was for the defendants to show by affirmative evidence that they had lost the goods. I do not think that this is so. This contention does not appear to have been put forward in any of the reported cases when the Company claimed to be exempt from liability by reason of their special contract and it may be observed that in the case reported in *Tippamma v. Southern Maharatta Railway Company*<sup>1</sup>, it is expressly stated that there was no evidence on the one side or the other as to how the goods disappeared. The basis of the plaintiff's claim is non-delivery of goods which the defendants agreed to carry subject to the terms of the 'Risk Note.' There is no doubt a *prima facie* liability on the defendants to deliver but if the defendants set up their special contract and allege loss, (and I think it must be taken that there is an allegation by the 2nd defendant Company of loss though it is a very half-hearted one), I think it is for the plaintiffs to show that the circumstances in which the goods disappeared were not such as to amount to "loss" within the meaning of the special contract. The frame of the plaint in the present case and the form of the 7th issue in the case show that the plaintiff's advisers were fully alive to this. In the present case the plaintiff sought to show that the goods were not 'lost' inasmuch as they were wrongly delivered; but the lower courts were against them on the facts. The two cases under the Limitation Act to which the learned Counsel of the appellants referred, *Mohansing Chawan v. Henry Conder*<sup>2</sup> and *Danmull v. British India Steam Navigation Company*<sup>3</sup>, have really no bearing on the question before us. In these cases it was held that for the purposes of the Limitation Act non-delivery was no proof of loss. It was for the defendants who set up the plea of limitation in these cases to show affirmatively that the goods were lost at a time before the statutory period of limitation. The fact that they were not delivered would not of course show this. The defendants in these cases had to prove the time of the loss, not the mere fact of the loss.

On the findings of fact by the lower courts, I think we have no alternative but to dismiss this appeal with costs.

MOORE, J.—I concur. ———

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1. I. L. R., 17 B. 42.      2. I. L. R., 7 B. 478.      3. I. L. R., 12 C. 477.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH.)

Present :—Sir Charles Arnold White, *Chief Justice*.

Mr. Justice Davies and Mr. Justice Sankaran Nair.

Suppa Reddiar ... Appellant\* (*Defendant, Counter-Petitioner.*)

v.

Avudai Ammal ... Respondent (*Assignee- Petitioner.*)

*Limitation Act, Arts. 178 and 179—Transfer of decree—Transferee applying for execution—Objection by judgment-debtor—Transfer benami for him—Application dismissed—Suit by transferee for establishing right and decree—Application for execution—Revival of former application—Limitation.*

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Where the transferee of a decree applies for execution which is rejected on the ground that the transfer is for the benefit of the judgment-debtor and where after establishing his right to execute in a suit he again applies for execution, such application is merely to revive or continue the former application and is governed by Art. 178 of the Limitation Act and not by Art. 179.

*Narayana Nambi v. Pappy Brahmani*<sup>1</sup>, overruled.

Time only begins to run from the date of the decree declaring the respondent's right to proceed in execution.

Appeal from the order of the District Court of Tinnevely, dated 21st October 1903, in A. S. No 118 of 1903, presented against the order of the District Munsif's Court of Srivilliputhur, dated 9th February 1903, in E. P. No. 905 of 1902 (in O. S. No. 793 of 1903).

*V. Krishnaswamy Aiyar* for appellant.

*M. R. Ramakrishna Aiyar* for respondent.

The Court (Mr. Justice *Subrahmania Aiyar* and Mr. Justice *Sankaran Nair*.) made the following

ORDER OF REFERENCE TO A FULL BENCH :—In this case the respondent's assignor obtained a mortgage decree against the appellant on the 28th February 1894.

On the 16th May 1895, the decree-holder assigned the decree to the respondent who applied for execution on the 6th December 1897. After notice that application was struck off on the ground

\* A. A. A. O. No. 11 of 1904.

20th September 1904.

1. I. L. R., 10 M. 22.

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that the encumbrance certificate was not produced. Respondent again applied on the 25th February 1898 and sale was ordered. As batta was not paid, this application also was struck off on the 15th April 1898.

Then on the 15th June 1898 the respondent again applied for execution. The appellant having contended that the assignment was for his benefit and that therefore the respondent was not entitled to execute the decree, the District Munsif held an enquiry under S. 232, Civil Procedure Code, and dismissed the application being of opinion that the appellant's contention was true.

Thereupon the respondent brought a suit, as she was entitled to do (*Bommanappatti Veerappa v. Chintakunta Srinivasa Rau*<sup>1</sup>), to establish her claim that the assignment was for her own benefit. The suit was dismissed in the first Court but the Appellate Court on the 20th February 1901 "declared that the plaintiff (respondent) has obtained a true and valid assignment of the decree in O. S. No. 793 of 1893 and is entitled to execute it."

The respondent then filed this application on the 24th November 1902 and the question is whether her right to execute the decree is barred by limitation. The effect of the order of the District Munsif passed under S. 232, Civil Procedure Code, was, as long as it remained in force, to render the execution of the decree impossible and it was after the appellate decree recognizing the appellant's right to execute the decree as assignee that it became competent to her to apply. If Article 179 of the Limitation Act alone applied to the case in such circumstances, the right to execute the decree must be held to be barred in spite of the apparent injustice of such a view.

The High Courts of Calcutta, Bombay and Allahabad have declined to accept such a conclusion. In substance they adopt the view that when an obstruction to the execution of the decree arises necessarily involving litigation and such obstruction is removed by a decision in favour of the decree-holder, whether in execution proceedings or otherwise, the right of the decree-holder to move the Court with reference to the execution of the decree should be treated as governed by Article 178 of the Limitation Act and where

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1. I. L. R., 26 M. p. 264.

such application is made within the time fixed by that article and action taken thereunder, such action should be viewed as a continuation of the previous application for the execution of the decree, if any, even though the same has been dismissed in consequence of the obstruction subsequently removed. *Raghunath Sahay Sing v. Lalji Singh*<sup>1</sup>, *Kalyanbhai Dipchand v. Ghanasham Lal Jadunathji*<sup>2</sup>, *Chintaman Damodar Agushe v. Balshastri*<sup>3</sup>, *Narayan v. Sono*<sup>4</sup>, *Thakur Prasad v. Abdul Hasan*<sup>5</sup>.

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In this Court, however, a different view of the law was adopted in *Narayana Nambi v. Pappy Brahmani*<sup>6</sup>, notwithstanding the opinion of Turner C. J. in *Virasami v. Athi*<sup>7</sup>, which was in accordance with his own view in *Paras Ram v. Gardner*<sup>8</sup>. Mr. Justice Parker who took part in the decision in *Narayana Nambi v. Pappy Brahmani*<sup>6</sup>, apparently modified his views on the point. See A. A. O. No. 108 of 1895 referred to in *Sasivarna Tevar v. Arulanandam Pillai*<sup>9</sup>. This decision in *Sasivarna Tevar v. Arulanandam Pillai*<sup>9</sup>, and the one in *Suryanarayana Pandarathar v. Gurunada Pillai*<sup>10</sup>, do not seem entirely to accept the decision in *Narayana Nambi v. Pappy Brahmani*<sup>6</sup>. In this state of authorities we refer to a Full bench the question whether the respondent's right to execute the decree was on the 24th November 1902 barred by the law of limitation.

The Court expressed the following

OPINION:—We think that the application in this case should be treated not as an application for execution, but as an application to revive or continue an application for execution that had been wrongly dismissed as a competent Court has declared. The Article applicable is therefore 178 of the second Schedule of the Limitation Act and time began to run from the date of the appellate decree declaring the respondent's right to execute, which was the 20th February 1901. This application was therefore in time. We follow the decisions of the other High Courts cited in the order of reference and overrule the decision in *Narayana Nambi v. Pappy Brahmani*<sup>6</sup>. Our answer to the reference is in the negative.

1. I. L. R., 23 Cal. 397.
2. I. L. R., 5 Bom. 29.
3. I. L. R., 16 Bom. 294.
4. I. L. R., 24 Bom. 345.
5. I. L. R., 23 A. 13.
6. I. L. R., 10 M. 22.

7. I. L. R., 7 M. 596.
8. I. L. R., 1 A. p. 355.
9. I. L. R., 21 M. 261.
10. I. L. R., 21 M. 257.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH).

Present :—Sir Charles Arnold White, *Chief Justice*,

Mr. Justice Davies and Mr. Justice Sankaran Nair.

Somasundara Mudali, minor, by his guardian

Vythilinga Mudaliar ... .. Appellant\*  
(1st Defendant).

v.

Kulandaivelu Pillai ... .. Respondent  
(Plaintiff).

Somasundara Mudali v. Kulandaivelu Pillai Civil Procedure Code, S. 13, Explanation 5—*Res judicata*—Person impleaded as defendant, not interested in relief—Decision not binding.

Where a person who is a defendant in a suit is not interested in the relief prayed for in that suit a decision passed in such suit does not bind him in a subsequent suit.

Under S. 13, Explanation 5, C. P. C., the plaintiff in the first suit can represent the plaintiff in the second suit only if the latter has any right to any relief claimed in the first suit.

*Chandu v. Kunhamed*<sup>1</sup> overruled, *Mahabala Bhatta v. Kunhanna Bhatta*<sup>2</sup> approved.

Where, therefore, four out of five reversioners brought a suit against the defendant in possession for recovery of their shares in the estate of the last male owner impleading as a defendant the 5th reversioner who refused to join in the suit and obtained a decree, a decision in such suit cannot be pleaded as *res judicata* in a suit brought by the fifth reversioner or his representative.

Second appeal from the decree of the District Court of Trichinopoly in A. S. No. 112 of 1902 presented against the decree of the Court of the District Munsif of Kulitalai in O. S. No. 396 of 1901.

The Court (Mr. Justice Boddam and Mr. Justice Sankaran Nair) made the following

ORDER OF REFERENCE TO A FULL BENCH :—The question in this case is whether the matter is *res judicata* under S. 13, explanation v, Civil Procedure Code.

The previous suit was brought by the 2nd, 3rd and 4th defendants as plaintiffs to recover the property in suit from the 1st defendant who claimed to retain possession of it as the adopted son of the previous admitted owner. The 5th defendant, a brother of the 2nd, 3rd and 4th defendants (the plaintiffs) was made a

\* S. A. No. 595 of 1903.

13th October 1904.

1. I. L. R., 14 M. 324.

2. I. L. R., 21 M. 373 (383).

defendant in the suit on the ground that he refused to join them in the suit.

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The District Court in that suit held that the 1st defendant had failed to prove his adoption and gave a decree for possession to the plaintiffs for the whole including the share of the 5th defendant. The High Court on appeal modified the decree by excluding the share of the 5th defendant on the ground that the plaintiffs were not entitled in the suit to recover that share.

The present plaintiff sues as a mortgagee and auction-purchaser of the 5th defendant and the 1st defendant again sets up his adoption which he failed to prove in the previous suit.

Having regard to the document A which is the mortgage by the 5th defendant to the plaintiff and being of opinion that the parties were at the time of the previous suit undivided with respect to the property in suit though otherwise divided and that the plaintiffs therefore represented in that suit the 5th defendant, if we are to follow *Chundu v. Kunhamed*<sup>1</sup> and *Latchanna v. Saravayya*<sup>2</sup> the matter is *res judicata*. If on the other hand we are to follow *Mahabala Bhatta v. Kunhanna Bhatta*<sup>3</sup> the 5th defendant was not represented by the plaintiffs in that suit (defendants Nos. 2 to 4) and the matter is not *res judicata*.

In this conflict of authorities we refer to the Full Bench the question whether the 1st defendant's contention that he has been adopted is *res judicata* in this suit or not.

*T. V. Seshagiri Aiyar* for appellant.

*T. R. Ramachandra Aiyar* and *C. V. Anantakrishna Aiyar* for respondent.

The Court expressed the following

OPINION :—The defendants Nos. 2 to 5, sons of one Soku Mudali, are divided brothers and alleged by the plaintiff to be reversioners to the estate of their uncle Muthia Mudali.

The plaintiff claiming as the mortgagee and purchaser of the one-fourth share of the fifth defendant, sues for partition and to

1. I. L. R., 14 M. 324. 2. I. L. R., 18 M. 164. 3. I. L. R., 21 M. 373 at p. 383.

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recover possession of that share from the first defendant who denies that the fifth defendant is a reversioner and sets up his own title as the adopted son of the deceased Muthia Mudali. The plaintiff contends that the first defendant is estopped from raising this plea by the decisions in Original Suit No. 321 of 1893, Appeal Suit No. 246 of 1895 and Second Appeal No. 1289 of 1897.

That suit was brought by defendants Nos. 2 to 4 as reversioners to the deceased Muthia Mudali to recover the entire property including the fifth defendant's share from the first defendant who set up the same plea of adoption now put forward by him. The fifth defendant was made a third defendant on account of his refusal to join as plaintiff and allowed the suit to proceed *ex parte*.

The first defendant's alleged adoption was declared invalid and a decree was given by the appellate Court in favour of the plaintiffs overruling the contention that they were only entitled to their share and not to the share of the present fifth defendant: that Court holding that the fifth defendant could afterwards obtain his share on partition from his brothers.

The High Court, however, reversed the decree so far as the fifth defendant's share was concerned, the suit to recover that share was dismissed and the defendants Nos. 2 to 4 in this suit, the plaintiffs therein, were held entitled only to their three-fourths share.

Conceding that after the decision in the second appeal that suit must now be treated as one brought by the present defendants Nos. 2 to 4 for their share only of the property, it is contended by the plaintiff that the first defendant is estopped by the decision in that suit that his adoption is invalid from again relying upon it: that the plaintiffs in that suit represented their brother, the fifth defendant, who was jointly interested with them in the property and they were therefore then litigating in respect of a right claimed by them in common with the fifth defendant—See explanation 5 to S. 13 of the Civil Procedure Code—and reliance is placed upon the decisions in *Chandu v. Kunhamed*<sup>1</sup>, approved in *Latchanna v. Saravayya*<sup>2</sup>.

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1. I. L. R., 14 M. 324.

2. I. L. R., 18 M. 164.

It is contended on behalf of the first defendant that the fifth defendant was not in any way interested in that suit, as it must be now treated as having been brought by the then plaintiffs for the recovery of their share only, that they did not sue for such share for themselves and on his behalf, that the right put forward was not a common and indivisible right, that the explanation 5 to S. 13 must be confined to cases where leave to sue has been obtained under S. 3) of the Civil Procedure Code and that the case in *Chandu v. Kunhamed*<sup>1</sup>, has been disapproved in *Mahabala Bhattu v. Kunhamu Bhatta*<sup>2</sup>, and if the fifth defendant is not estopped then the first defendant cannot be estopped.

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Pillai.

The question that is referred to us for decision is whether the 1st defendant's claim is *res judicata*.

If *Chandu v. Kunhamed*<sup>1</sup> correctly declares the law, then the plaintiff's contention must be upheld.

But we are of opinion that that decision ought not to be followed and it proceeds on a wrong view of the scope of explanation 5 to S. 13 of the Civil Procedure Code.

The rule of English Law is thus stated in Vol. I of Daniell's Chancery Practice, 7th Edn., page 197, "In order to enable a person to sue on behalf of himself and others who stand in the same relation with him to the subject of the action, it is generally necessary that it should appear that the relief sought by him is beneficial to those whom he undertakes to represent; where it does not appear that all the persons intended to be represented are necessarily interested in obtaining the relief sought, such a suit cannot be maintained."

The authorities in support of this statement of the law are cited.

Judged by this test, it is clear there is no estoppel. The fifth defendant under whom the plaintiff claims was not interested in the then plaintiffs, his brothers, obtaining their share of the property: he was certainly not necessarily interested and he would not benefit by a decree in their favour for the relief granted to them.

1. I. L. R., 14 M. 324.

2. I. L. R., 21 M. 373.



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The only reported cases in India to which our attention has been drawn are to the same effect.

In *Gopalayyan v. Raghupati Ayyan*<sup>1</sup>, a member of a Hindu family brought a suit for his share of the family properties, all the other members being defendants and to ascertain what his share was it became necessary to decide whether the first defendant was adopted into that family. The decision that he was adopted was held in a subsequent suit not to be binding on the plaintiff therein, another member of the family, claiming his share of the property. Similarly in *Nabin Chandra Muzumdar v. Mukta Sundari Debi*<sup>2</sup>, the plaintiff in the first suit claimed to recover his share of his father's estate held by the defendant, who alleged title under a will left by the father, making his brother co-defendant. The decision that the will was genuine was held not to be binding on his brother, the co-defendant in the first suit, in a suit that was subsequently brought by him to recover his share of the property.

It is contended before us that whatever was the law before, explanation 5 to S. 13, Civil Procedure Code, now makes it clear that a co-owner in the circumstances above stated would be barred and that the decision in the first suit brought by the other co-owners would be binding on him.

We are unable to accede to this contention. Under S. 26 of the Civil Procedure Code, the persons who are to be joined as plaintiffs are those "in whom *the right to any relief* claimed is alleged to exist" as stated therein. The plaintiffs in the first suit can be held to represent the plaintiff in the second suit under explanation 5 to S. 13 only if the latter has any "right to any relief" claimed in the first suit. Then alone, using the words in the explanation 5, are the plaintiff in the first suit litigating in respect of a right claimed in common with the plaintiff in the second suit. This is strictly in accordance with the rule of English Law as cited above and is supported by the Full Bench decision in *Surendernath Pal Chowdhry v. Brojonath Pal Chowdhry*<sup>3</sup>.

In that case the plaintiffs sued to recover their share of the rent from defendants. Another co-sharer in the same estate had

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1. 3 M. H. C. R., 217.    2. 7 B. L. R. App. 88.    3. I. L. R., 13 C. 352.

previously sued for his share making the plaintiffs in the second suit co-defendants. These co-defendants allowed the suit to proceed *ex parte*. With reference to the question of *res judicata* the High Court held "If the former suit had been dismissed, could it have been said that the now plaintiffs are barred? Might they not have said, we had and have to do with our own share. We neither knew nor cared about other people's shares. Why should we have meddled in their suit?" *i. e.*, the plaintiffs in the second suit were not interested in the relief prayed for in the first suit and the relief that they claimed in the second suit was not claimed in the first suit.

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Pillai.

We agree with this judgment. The 5th defendant in the present suit is not interested in the relief that may be granted to the plaintiffs in the first suit. The conduct of the suit was not in his hands and with reference to the share of the plaintiffs in that suit he could not have been made co-plaintiff. He gets no advantage therefore from that suit. He cannot enforce any rights of his own under that decree. He cannot get his share and he could not have appealed.

The case in *Chandu v. Kunhamed*<sup>1</sup>, is undoubtedly in favour of the respondent. But no reasons are given in that judgment. For the reasons given above, we are unable to hold that that case was rightly decided.

The case in *Madhavan v. Keshavan*<sup>2</sup>, has no application. There, a decision dismissing a suit brought on behalf of a devasom by one trustee to recover lands alleged to have been illegally alienated was held to be binding on another trustee who brought a suit for the *same relief*.

We are therefore of opinion that the fifth defendant and the plaintiff are not barred by any decision in that suit and the first defendant therefore is not barred.

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1. I. L. R., 14 M. 324.

2. I. L. R., 11 M. 191.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir S. Subrahmania Aiyar, *Officiating Chief Justice*,  
and Mr. Justice Bhashyam Aiyangar.

The Municipal Council of Mangalore by its  
chairman ... .. *Petitioner\**.  
v.

Rev. L. Doneda, Manager of the Cordial  
Bail Press, Mangalore . . . . . *Respondent—*  
(Plaintiff).

Municipal Council of Mangalore v. Cordial Bail Press, Mangalore. *District Municipalities Act (Madras Act IV of 1884) Ss.53, 262, sub. S.(3), and Schedule A—“Income,” meaning of—Net income not gross—Jurisdiction of Civil Courts.*  
The word “income” occurring in Schedule A of the District Municipalities Act means the “net income” or the profits derived from a business and not the gross income or receipts.

*Lawless v. Sullivan*<sup>1</sup> followed.

Where a proprietor of a printing press is taxed upon his gross income or receipts, the provisions of the Act have not been in substance and effect complied with so as to oust under S. 262, Sub. S. 3 of the Act the power of Civil Courts to question the legality of the assessment.

Petition under S. 25 of Act IX of 1888 praying the High Court to revise the order of the District Munsif's Court of Mangalore in Small Cause Suit No. 430 of 1902.

*K. Narayana Rao* for appellant.

*P. C. Lobo* for respondent.

The Court delivered the following

**JUDGMENT:**—The preliminary question arising in this case is whether the cognizance of this suit by a Civil Court is barred by S. 262, sub-section (2) of the District Municipalities Act (Madras) IV of 1884; and that depends upon whether with reference to the proviso to that sub-section it can be held that the provisions of the Act have been in substance and effect complied with by the Municipality, if as contended by the Respondent (the owner of a Printing Press in Mangalore) he is liable to be taxed under the Act, with reference only to the profits of his business and not the gross

\* C. B. P. No 32 of 1903.

3rd December 1903.

receipts. Under S. 53 and Schedule A to the Act, the class under which he is liable to be taxed depends upon his "estimated income" and if the meaning of the word "income" in Schedule A be 'profits' or 'net income' and not gross income it will be impossible to maintain that the provisions of the Act have been in substance and effect complied with if the municipality have, as admitted, taken the estimated gross income and not the net income as the basis for determining the class in which the respondent is to be placed.

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Bail Press,  
Mangalore.

In our opinion the word 'income' which occurs throughout Schedule A must be taken to mean the 'net income' or profits derived from the business and not the gross income or receipts. In *Lawless v. Sullivan*<sup>1</sup> the question raised with reference to S. 4 of New Brunswick Act, 31 Vic. C. 36, was whether the tax thereby imposed upon the appellant bank was to be assessed upon the amount of income derived from its business within the city of St. John during the year in question without taking into account losses which had accrued during that period. The Privy Council reversing the decrees of the Courts below held that "there can be no doubt that in the natural and ordinary meaning of language the income of a bank or trade for any given year would be understood to be the gain, if any, resulting from the balance of the profits and losses of the business in that year. That alone is the income which a commercial business produces and the proprietor can receive from it. The question is whether the word 'income' in the enactment construed is to be understood in a different, and, what for the purpose of taxation would be a more onerous, sense" (pp. 378—379). After advertng at length to various provisions of the Act (then in question) and the arguments advanced in the case their Lordships came to the conclusion that "there is nothing in the enactment imposing the tax nor in the context which should induce them to construe the word 'income' when applied to the income of a commercial business for a year otherwise than in its natural and commonly accepted sense as the balance of gain over loss". The case of *The Queen v. The Commissioners of the Port of Southampton*<sup>2</sup> is there distinguished on the ground that the context in which the

1. L. R. 6 A. C. p. 373.

2. L. R. 4 H. L. p. 472.

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word 'income' in one of a series of Special Acts (then in question) relating to the Port of Southampton occurred clearly showed that the word was used to signify the total amount of dues and duties payable to the Commissioners under a former Act.

During the course of the argument in *Lawless v. Sullivan*<sup>1</sup>, Sir Montague Smith observed that the "burden is on those who seek to put the most onerous meaning on words used to show clearly that that meaning was intended." We find nothing in the context in Schedule A (to the District Municipalities Act) or in any other part of the Act, which would lead to the conclusion that the word "income" is there used in the 'more onerous sense' as contended for on behalf of the Municipality or otherwise than in its 'natural' and commonly accepted sense' as denoting the profits or net income derived from the business. The fact that the tax leviable under S. 53 is not an *ad valorem* tax upon 'income' but a tax upon 'arts, professions, trades, and callings' is not a circumstance suggesting, that the word 'income' occurring in Schedule A is not used in its ordinary acceptation above referred to, inasmuch as the amount of tax (ranging from Rs. 100 to 1) fixed under each of the nine classes in Schedule A is regulated with reference to the estimated income derived from the exercise of the various arts, professions, trades and callings therein mentioned.

We, therefore, hold that the jurisdiction of Civil Courts to take cognizance of the suit is not barred by sub-section 2 of S. 262 of Act IV of 1884 and that the decision of the District Munsif was right. The revision petition therefore fails and is dismissed with costs.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar  
and Mr. Justice Sankaran Nair.

Rangasamy Naicken ... Appellant\* (*Plaintiff Counter-Petitioner*  
v. *Decree-holder.*)  
Tirupati Naicken ... Respondent (*2nd defendant Petitioner*).

*Decree, competency of party to impeach in Execution proceedings—Jurisdiction, objection as to—Want of Evidence.*

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Naicken  
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Tirupati  
Naicken.

A party to the suit is precluded in execution from impeaching the decree which has been passed without opposition and which has not been set aside.

But he may impeach it on the ground that the court passing the decree had absolutely no jurisdiction to pass it and that, therefore, the decree was a nullity.

Where a court has jurisdiction to pass a personal decree the passing of such decree without any evidence in support thereof will not make it as one passed without jurisdiction.

Appeal from the order of the District Court of Coimbatore in A. S. No. 33 of 1903 presented against the order of the Court of the District Munsif of Coimbatore in E. P. No. 455 of 1902 (in O. S. No. 485 of 1901).

*P. S. Sivaswami Aiyar* for appellant.

*S. Kasturiranga Aiyangar* for respondent.

The Court delivered the following

**JUDGMENT:**—The plaintiff in O. S. No. 485 of 1901 obtained a decree against the respondent who was the 2nd defendant therein and his father for the payment of a sum of money lent to the father and alleged to have been paid for the marriage of the respondent. The suit was on a promissory note executed by the father alone. The plaint contained a prayer for a personal decree against both the defendants. Neither of them appeared or contested the claim. A decree was passed as prayed for. An application to set aside the decree was made by the respondent, but the application was rejected as he failed to comply with the terms of the order which directed him to furnish security. The father of the

\* A. A. A. O. No. 100 of 1903.

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1st defendant is dead. An application was once before made to execute the decree against the 2nd defendant and he was arrested in pursuance of the order then passed to execute the decree. The amount was not then realized. The plaintiff now applies to execute the decree and the District Judge has held that the decree making the 2nd defendant personally responsible was not a valid decree apparently on the ground that the circumstances which alone would warrant a personal decree against the 2nd defendant did not exist and had not been proved.

If a decree is passed by a Civil Court which had absolutely no jurisdiction to pass it even a party to the proceeding may impeach it as a nullity though it had not been set aside in appeal or otherwise.

This, however, is obviously not such a case; as the District Munsif in O. S. No. 485 of 1901 was quite competent to pass a personal decree against the 2nd defendant if the evidence required to establish the personal liability had been then produced.

The fact that a decree is passed in the absence of such evidence would not make it a decree passed without jurisdiction and a party to the suit is precluded in execution from impeaching the decree which was passed without opposition and which has not been set aside Cf. *Revell v. Blake*<sup>1</sup>, *Sardarmal v. Aranvayal Sabhapathy*<sup>2</sup>, *Gomotham Alamelu v. K. mandur Krishnamacharlu*<sup>3</sup>.

The case in *Lakshmanaswamy Naidu v. Rangamma*<sup>4</sup> is clearly distinguishable. The decision proceeded on the footing that the decree therein in question was on the face of it null and void.

We, therefore, reverse the order of the District Judge and direct that the application for execution be replaced on the file and proceeded with in accordance with law. The respondent will pay the appellant's costs in this and in the lower appellate Court.

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1. L. R. 8 C. P. 533.

2. I. L. R., 31 B. 205 at p. 211.

3. I. L. R. 27 M. 118.

4. I. L. R. 26 M. p. 31.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH).

Present :—Sir Charles Arnold White, *Chief Justice*,

Mr. Justice Davies and Mr. Justice Sankaran Nair.

*S. A. No. 2492 of 1903.*

Kenath Puthen Vittil Tavazhi Karnavan and

Manager Shuppu Menon ... Appellant\* (*Plff.*)

v.

Narayanan (family manager) and others .. Respondents (*Defts.*)*Malabar Law—Tarwad, meaning of—Tavazhi, meaning of—Karnavan's right to renounce Karnavanship—Status of Karnavan—Immoveable property—Registration Act, S 17.*Shuppu  
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A Karnavan in Malabar is the senior male member of a group of persons all of them tracing their descent in the female line from a common female ancestor (and forming a Marumakkatayam tarwad) owning joint property under the absolute control and management of the Karnavan.

The term tavazhi is used in three senses :—(1) a mother and her descendants in the female line or the line of a single mother; (2) any branch of a tarwad in separate possession of a portion of the joint family property holding the same for convenience of enjoyment ; (3) a branch of a tarwad separated in interest from the main tarwad. It is then really a tarwad by itself.

It is open to the Karnavan of a tarwad to renounce his Karnavanship including his right to manage the tarwad affairs.

Per *Subrahmania Aiyar* and *Boddam, JJ.* :—The right to the status of a Karnavan cannot be treated as an interest in immoveable property within S. 17 of the *Registration Act*.

Second Appeal from the decree of the Subordinate Judge's Court of Palghat in A. S. No. 58 of 1903 presented against the Decree of the Court of the District Munsif of Palghat in O. S. No. 338 of 1902.

*In A. A. O. No. 15 of 1903.*

The Court (Mr. Justice Subrahmania Aiyar and Mr. Justice Boddam) made the following

ORDER OF REFERENCE TO A FULL BENCH :—The plaintiff was at the date of the suit the senior member of the tarwad to which the parties belong. Previously thereto he had been actually managing the affairs of the tarwad though one

\* S. A. No. 2492 of 1903 and A. A. O. No. 15 of 1903.

13th October 1904.



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Teyyunni Menon was the then *de jure* karnavan. Disputes having arisen between the karnavan, the present plaintiff and the other members of the family, a suit was brought by the karnavan for dispossessing the present plaintiff, and various questions had been raised for determination in that suit. The litigation was adjusted amicably on the terms and conditions stated in Exhibit I filed by the parties before an arbitrator in the course of that litigation. Among other things it was then agreed that the present plaintiff should, unless three-fourths of the members of the family decided otherwise, cease to have anything to do with the management not only during the life-time of the karnavan but even after his death, though he was the person next entitled to succeed as such. The compromise of the litigation and, in particular, the arrangement for the payment of the debts that had been contracted by the plaintiff as well as the specific provision made for his maintenance constituted, of course, ample consideration for the plaintiff's promise, assuming consideration was required to, and could, give it validity. Nor is the objection that the provision in question is incapable of being proved for the reason that Exhibit I was not registered, sustainable since the right to the status of a karnavan cannot be treated as an interest in immoveable property, within the meaning of S. 17 of the Indian Registration Act.

The real question for determination is whether the plaintiff's renunciation of his right to succeed as karnavan is valid in law. The arrangement evidenced by Exhibit I was no doubt a family *karar*, having been entered into by all the members of the family. It was also one calculated, as a whole, to benefit the family as it put an end to litigation which must necessarily have entailed loss and injury otherwise. But the fact that the agreement by the plaintiff was a part and parcel of the arrangement so entered into could not make the agreement valid if it was incompetent to the plaintiff to renounce the right to the karnavanship.

In *Cherukomen v. Ismalu*<sup>1</sup> this question of renunciation was carefully considered. Holloway, J. admitting that the general rule is power of renunciation, points out certain exceptions. One

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1. 6 M. H. C. R. p. 145.

marked class regarded rights coupled with relative duties prescribed by an absolute law. This phrase 'absolute law' refers to rules which in the language of Savigny "govern with an immutable necessity without leaving any play-room to the individual will." (See Holloway's Translation, p. 46). They contrast with rules which "at first leave free power to the individual will and only take its place in order to give the necessary definiteness to the jural relation where that will has failed to exercise its power" (see *ibid*). A more modern writer puts the same matter thus:—"the greatest part of the law leaves to the individual full freedom to make his legal dispositions and to direct his legal relations according to his own judgment and therefore only comes into application when those concerned have arranged nothing otherwise, by its supplementing their imperfectly declared will. This is called 'Dispositive law.' But there are besides other institutions which plainly limit individual will and exclude every private disposition of a contrary tendency—absolute legal rules, 'Peremptory law' (see Salkow-ki's Roman Private law. Translated by Whitefield, pp. 16 and 17). The foundation of 'absolute' 'peremptory' or as it has also been called 'imperative' law is of course general interest or utility (see Savigny Translation by Holloway p. 46). In *Hunt v. Hunt*<sup>1</sup> cited by Holloway, J. with reference to the class of rights prescribed by absolute law, Westbury, Lord Chancellor, adverting to the maxim '*quilibet potest, renunciare juri pro se introducto*' observed:—"I beg attention to the words *pro se* because they have been introduced into the maxim to shew that no man can renounce a right which his duty to the public, which the claims of society, forbid the renunciation of<sup>1</sup>."

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The second class of rights forming an exception to the rule of renunciation according to Holloway, J. consists of those resulting from a natural condition and of which a type is the instance impressively put in the text of the Digest quoted by him viz., "It is the opinion of Julian that the law of relationship (through males) cannot be disclaimed by agreement no more than one may say that he does not wish to be himself."

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1. 31 L. J. Ch. at p. 175.

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Adverting to the views stated by him in this case of *Cherukomen v. Ismala*<sup>1</sup>, Holloway, J. three months later said in *Valia Kaimal v. Velluthadatha Shamu*<sup>2</sup>. "We have recently expressed a strong inclination of opinion that the doctrines as to the power of renunciation do not apply to a person in the position of a Malabar karnavan". It would thus seem that the rights and obligations attaching to the status of a karnavan were understood by Holloway, J. to be those prescribed by 'absolute law' and also as arising from a natural condition, and consequently that his settled view was that they were utterly incapable of renunciation. In *Valia Kaimal v. Velluthadatha Shamu*, Scotland (J.), contented himself with an expression of doubt whether a karnavan can irrevocably renounce his rights and duties.

Innes, J. however, who took part in *Cherukomen v. Ismala*<sup>1</sup> apparently entertained a somewhat different view. His judgment in the case concludes thus:—"A man cannot assign obligations (i. e., cannot substitute some one else as the performer of his duties) without the consent or authority of those to whom the duties are owing, and whereas, in the present case, rights are co-existent with and inseparable from obligations, so that the assignment of the one cannot be effected without the assignment of the other, there can be no valid transfer of rights without the consent and authority of those interested in the performance of the obligations." If these passages were to be understood as implying that an assignment by a karnavan of his powers and duties to another member of the tarwad with the consent of all the rest of the tarwad would be valid, a renunciation with similar assent would be equally so. Now if the assent of all the members could give validity to an assignment by a karnavan of his powers and duties to one of their own number it would be difficult logically to contend that such assent would not avail to support a transfer of those powers and duties to a stranger. But in *Chappen Nair v. Assen Kutti*<sup>3</sup> the delegation of the powers and duties of a karnavan to his son who of course did not belong to the tarwad was held void. The description of the right by Collins, C. J. and Muthusami Aiyar, J. in this case viz., "Karnavanship is a birth-right inherent in one's status as the senior male member of

1. 6 M. H. C. R. p. 145.

3. I. L. R., 12 M. p. 219.

2. 6 M. H. C. R. 401.

a family" seems to accord with the view of *Holloway, J.* that it is a right arising from a natural condition.

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It has been urged that where a karnavan does not wish to continue as such he ought to be at liberty to renounce, as otherwise a family would not be able to get rid of an unwilling manager and its interest must consequently suffer. It would seem, however, that a tarwad would not in such a case really experience any practical difficulty since a karnavan may without actually abdicating his position lawfully utilize the services of an anandravan in the management of the affairs of the family subject to his own supervision. And if having regard to considerations like that suggested in the argument a power of renunciation on a karnavan's part were to be recognised, it is not unlikely that such a course would be attended with consequences not capable of being adequately dealt with otherwise than by legislation. Take the present case itself. The renunciation is but conditional. The assent of the prescribed majority might as the words of the instrument apparently imply at any moment endow with active vitality the plaintiff's capacity for karnavanship which according to the arrangement is but dormant. Here is opportunity for canvassing and suppose some of the voters are purchased by the plaintiff, are the Judges to invent the rules and principles with reference to which such questions of voting, election, etc., are to be decided? It is scarcely necessary to say that Courts will not be able satisfactorily to deal with these and like matters which the interest and ingenuity of individual members of tarwads are sure to bring about.

The better conclusion would seem, therefore, to be that adopted by *Holloway, J.* Having regard however, to the difference in the views held by him on the one hand and *Innes, J.* on the other, and to the intrinsic importance of the question, the point appears to us to call for a decision by a full Bench.

It is perhaps necessary to add a few words with reference to one special feature of the present case, viz., that the renunciation was made before the right to succeed as karnavan had actually accrued. The mischiefs against which section 6 of the Transfer of Property Act, clause (a), was aimed at, whereby the transfer of the

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chance of an heir apparent succeeding to an estate, the chance of a relation getting a legacy on the death of a kinsman or other mere possibility of a like nature is prohibited, can hardly be predicated of a simple unilateral act of renunciation in respect of the karnavanship. And whether the view of *Holloway, J.* or that of *Innes J.* should prevail the fact that renunciation was in respect of the plaintiff's future right to succeed as karnavan would in the circumstances of the present case not be material, for if a karnavan's right is one governed by an absolute law or arising from a natural condition a renunciation of it whether present or future must be invalid and if it is one capable of being renounced with the consent of the members of the tarwad such consent was here given. And though instances of rights capable of renunciation after accrual but not before, are not wholly unknown to the law, yet they seem to be extremely few and special in their character and there is no warrant for supposing that if a karnavan actually such can renounce his right, renunciation by a would-be-karnavan would be invalid on the mere ground of the futurity of the rights renounced. The rule of the Roman law was that in the case of a right not yet acquired a unilateral declaration of volition having a renunciation for its object bound its author and was irrevocable" (Goudsmit on Pandects. Translated by Tracey Gould, p. 141. See also observations of *Holloway J.* in *Subbien Pillay, v. Aranachala Irungol Pillai*,<sup>1</sup> citing Wachter II 648).

We, therefore, refer for the opinion of the Full Bench the question whether the renunciation by the plaintiff of his right to karnavanship is or is not valid ?

*J. L. Rosario* for appellant.

*T. R. Ramachandra Aiyar* for respondents.

The Court expressed the following

OPINION :--By a razi in O. S. No. 22 of 1888 the plaintiff was appointed the manager of his tarwad in the place of the then Karnavan, one Teyunni Menon. His management proving unsatis-

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1. 5 M. H. C. R. at p. 150.

factory, a suit to which all the members of the tarwad were parties was brought to remove him. Pending the suit, the disputes between the parties were referred to arbitration. By the karar or arrangement then arrived at the plaintiff retired from the management and it was provided that even after the death of the then karnavan, Teyunni Menon, when this plaintiff next in age would be entitled to the karnavanship and management of tarwad property he was not to take up the management of tarwad affairs unless a majority of the members of the tarwad agreed to it. His debts were paid and he was given a comparatively handsome allowance.

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The karnavan having since died, the plaintiff claims against the terms of the karar to succeed to the karnavanship of the tarwad and to the possession and management of its properties. He contends that his renunciation by that karar of his right so to succeed is invalid in law and the question that is referred to the decision of the Full Bench is "whether the renunciation by the plaintiff to succeed to the karnavanship is valid in law".

A karnavan in Malabar is the senior male member of a group of persons, all of them tracing their descent in the female line from a common female ancestor owning joint property under the absolute control and management of the karnavan. This group form a Marumakkatayam tarwad. In this tarwad a mother and her descendants in the female line, by themselves, constitute a tavazhi, i. e., the line of a single mother. But this term is usually applied to any branch of a tarwad in separate possession of a portion of the joint family property holding it thus for convenience of enjoyment. The term is also occasionally applied to such a branch even when there is a severance of interest and the main tarwad loses or is deprived of all interest in the property in the possession of this branch or tavazhi and the latter has really developed into a tarwad by itself. See *Valia Kaimal v. Velluthadatha Shamu*<sup>1</sup>. While the senior male member in a tarwad is the karnavan of all the members in the tarwad and hence is called the karnavan of the tarwad, every member is the karnavan of his junior in age and anandravan of those senior to him in the tarwad, the terms

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1. 6 M. H. C. R. p. 401.

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karnavan and anandravan being correlative. Every member is thus a karnavan or anandravan of every other member in the tarwad. A tarwad may be split into various branches, each branch holding its own property without community in the property held by another branch. When such division has taken place each branch or tavazhi, forms so far as Courts are concerned a separate tarwad by itself—the senior male of each branch is treated in law as the karnavan of that tarwad. As pointed out by Mr. Justice *Holloway* in *Valia Kaimal v. Velluthadatha Shamu*<sup>1</sup> in popular language all the members of the separated branches still belong to the same tarwad but “in the only sense with which Courts of Justice are concerned they do not.” The result is that the members of the original or larger tarwad continue to treat one another as karnavans and anandravans though there may be no community of property between them and they do not strictly at any rate, as Mr. Justice *Holloway* correctly points out, in a court of law belong to one tarwad. To put it briefly, even though the members of a tarwad may divide all the property, they still continue karnavan and anandravan. For purposes of pollution, for the performance of funeral ceremonies, for purposes of succession, the relationship is recognized to subsist.

It is this relationship of one person to the other members of the tarwad or group of tarwads which Mr. Justice *Holloway* had in view in the case in *Cherukomen v. Ismala*<sup>2</sup>; at any rate his remarks have reference to such relation. Such relationship may be the source of obligations social and religious and may subsist as already pointed out between persons without any community of property. As a general rule substituting females for males, the quotation in *Cherukomen v. Ismala*<sup>2</sup> from Julian “that the law of relationship (through males) cannot be disclaimed by agreement no more than one may say that he does not wish to be himself” is applicable. But the question before us is not whether this karnavanship, the relationship due to their natural condition may be renounced or not. The question is whether the plaintiff may renounce the rights or obligations including the right of management which devolved on him as

1. 6 M. H. C. R. 401.

2. 6 M. H. C. R. p. 145.

karnavan or the senior male member in the tarwad. This renunciation of the bundle of rights and duties is also called the renunciation of karnavanship.

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Karnavans are frequently removed by Courts from the management of tarwad property. Such suits are loosely termed suits to remove karnavans—though a karnavan cannot be deprived as above stated of his relationship of karnavan to the other members of his tarwad, but can only be removed from the management of tarwad properties. When the Courts remove a karnavan, the decree does not determine the natural relationship that exists between the karnavan and the other members: they still continue karnavan and anandravan for the performance of funeral ceremonies and the like.

The only question therefore is whether a karnavan may himself renounce that power of management of which for adequate reasons he may be deprived by a Court of law.

In the order of reference it is stated and, in our opinion, correctly that if it is not open to a karnavan to renounce the rights or obligations attached to his position, he could not do so by a razi or contract. If he could renounce by contract, there is nothing to prevent him from doing it voluntarily as a unilateral act of renunciation.

The general rule is in favour of renunciation so far as his right to manage the property of the tarwad is concerned and the decisions clearly recognize such right.

In A. S. No. 336 of 1854 the claim was to set aside a mortgage which would have been otherwise valid on the ground that the karnavan had no right to grant it according to an agreement to which all the members of the tarwad were parties. In declaring the mortgage invalid Mr. *Holloway*, then Sub-Judge, observed "I am clearly of opinion that the whole of the members of a family have a right, by common consent, to regulate the karnavan's agency" ..... "I am of opinion that with the consent of all the members it was possible for the tarwad to narrow his authority." *Zillah Decisions*, Sep. 1855, page 18.



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In S. A. Nos. 87 and 88 of 1857 (Sudder Decisions 1857, p. 158) the Sudder Court upheld an agreement under which the karnavan had renounced his right of exclusive management and the tarwad properties were agreed to be managed by himself jointly with another.

The karnavan could thus renounce the right of exclusive managements vested in him.

In S. A. No. 368 of 1862 the High Court confirmed a decision of Mr. Holloway in which he held that the plaintiff, the karnavan, was estopped by an agreement entered into between himself and the 2nd defendant, a junior member, by which the 2nd defendant was to be in management of the tarwad properties in one taluk, and himself, the karnavan, of such properties in another taluk, and a suit brought by the karnavan was dismissed.

This is an instance of an absolute renunciation of the right to manage a substantial portion of the properties of the tarwad.

The High Court in S. A. No. 8 of 1880 in upholding a karar against the karnavan held :—"The contention of the appellant is the karar (agreement) of 1868 was illegal \* \* \* \*  
\* \* \* It is not necessary for us to consider whether the karar if objected to by the family is one which could be allowed to stand against them. There is no such objection by any of the family, though it was executed in 1868 and has been acted upon with full consent of the family down to the present time. There is ample reason to suppose that the karar was executed for the benefit of the family. It is the outcome of disputes and litigation in the family and by it those disputes and that litigation were happily ended. There is apparently no reason for setting aside this karar and certainly none at the instance of the plaintiff (the karnavan)".

The karar there sought to be set-aside was entered into between the karnavan and one of the anandravans by which the income of the tarwad was to be collected and expenses defrayed by the anandravan and all the documents on behalf of the family were to be in his handwriting. Properties were not to be demised without his consent. It also provided for the custody of the

tarwad documents. The anandravan is to file suits in the karnavan's name on his vakalat for rents, &c.

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There was thus practically a renunciation of the rights of the karnavan to manage the tarwad property. There was only the title and the shadow of his old power left to him. The tarwad management was practically handed over to a junior member and such renunciation was held valid.

Again in S. A. No. 357 of 1881 the High Court held :—  
“The rights of the parties were adjusted by the compromise and the decree passed thereon, and in our judgment it has been properly held that the respondent was to hold possession at least till some other arrangement was made or possibly until the death of the karnavan. *The right of the karnavan to recover possession applies to cases in which he has voluntarily conceded a temporary possession to an anandravan for management.* Here he has no greater right to put an end to the contract than any member of the family”.

By the agreement there sought to be set aside certain lands were left in the possession of the defendant, an anandravan, who was to maintain himself and his tavazhi, i. e., some other members of the family with the income thereof. The karnavan sought to set aside the agreement and to recover the lands. The words in italics indicate the right principle to be followed.

Similarly in S. A. No. 363 of 1883 a family agreement was held to be binding upon the succeeding karnavan—the High Court holding “Both the Courts have found that the lands in suit are included in the paddy tract called Kallamulli which was set apart for the defendants' branch of the tarwad in the family agreement. The plaintiff, however, as the common karnavan asserts a right to resume the lands and re-allot them at pleasure. He has no such right since the allotment was not one made by the former karnavan of his own authority but as part of a family arrangement which binds him in common with the whole family”.

Appeal No. 120 of 1889 was a remarkable case. As an exception to the ordinary rule the karnavanship of the tarwad in

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question was vested in the senior female called Valia Rani, and on account of disputes among the members a karar was entered into by which the Valia Rani surrendered the entire right of management to the senior male and after her death, that right to manage was vested *de jure* in the then senior female but the *de facto* management was vested in the senior male according to the old usage in the family subject to certain specific powers preserved to the senior female who held the karnavastanom. It will be noticed that the then Valia Rani was excluded from all management even to the extent to which future Valia Ranis were permitted to interfere. This renunciation was enforced against the Rani when she sought to resume management. It is true the case of *Cherukomen v. Ismala*<sup>1</sup> was not quoted nor was the question discussed. Nevertheless the case is important as showing that such renunciations have been always recognized.

In *Kanna Pisharodi v. Kombi Achan*<sup>2</sup> it was held that "ordinarily, it is of course true that the karnavan of a Malabar tarwad is entitled to grant a renewal of a kanom, but it is in the power of the family, with the assent of the karnavan, to place a restriction on his ordinary powers".

To the same effect is the decision in *Komu v. Krishna*<sup>3</sup>. "As to the contention that he did not consider the objection taken by the petitioner, viz. : that, as the present karnavan of the tarwad, he was entitled to set aside the karar sued upon, we are of opinion that the karnavan is not entitled of his own authority to set aside a family arrangement made on behalf of all the members of the tarwad".

The practice is widely prevalent whereby tavazhis are constituted (See S. A. No. 368 of 1883 above referred to) i. e., properties are set apart for the support of some members of a tarwad who form a tavazhi under the control and management of the senior male of that branch who so far as the management of these properties is concerned takes the place of the karnavan of the tarwad.

1. 6 M. H. C. R. p. 145.

2. I. L. R., 8 M. p. 381.

3. 1, L. R. 11 M. p. 134.

In all such cases there is a renunciation by the tarwad karnavan of all his rights of management though he still continues to be styled the karnavan.

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The Courts have gone further and have held after some hesitation that the members of tarwad may withdraw themselves entirely from his control and form themselves into a separate tarwad and thereby put an end to all the karnavan's rights over them. In a series of cases beginning with *Kunhacha Umma v. Kutti Mammi Hajee*<sup>1</sup> which overruled certain previous decisions it has been held that a mother and children may form themselves into a distinct tarwad with their own senior male as karnavan treating themselves *inter se* as sole members of a tarwad without interference by the karnavan of their main tarwad from which they have separated. This shows, that for the purposes of guardianship, survivorship, the succeeding members have renounced their anandravanship and determined the karnavan's rights over them. All these cases are repugnant to the contention that a karnavan cannot renounce by contract or otherwise his rights or powers of management. His powers may be curtailed, may be exercised only under conditions imposed by the tarwad, may be reduced to a vanishing point, may be entirely renounced or taken away with reference to the tarwad members or the tarwad property.

These decisions are in accordance with usage and were not cited apparently before the learned Judges who made the reference. *Cherukomen v. Ismala*<sup>2</sup> was a case in which what was put forward as a deed of renunciation was held to be a power of attorney, and the question therefore according to Mr. Justice Holloway did not arise for decision. The passage cited from Julian shows further that Mr. Justice Holloway was then considering the question whether "the law of relationship through males cannot be disclaimed by agreement" which is very different from the question before us whether one may not renounce the rights acquired by him on account of his relationship, though of course he cannot get rid of his relationship. *Holloway and Innes, JJ.*, were further con-

1. I. L. R. 16 M. 201.

2. 6 M. H. C. R. 145.

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sidering a case where it was argued that "there was an irrevocable waiver of the karnavan's rights and an irrevocable transfer of them to another."

This also is very different from a simple renunciation where the law vests the management in the next senior male. To appoint another person in his place as karnavan would be a direct interference with the right of his successor and that question stands obviously on a very different footing from a power of renunciation and can only be upheld, if at all, as a contract. In *Valiakaimal v. Velluthadatha Shamu*<sup>1</sup> the question was as to the effect of an arrangement made by a former karnavan. There was no renunciation of his rights by the person who then claimed as karnavan. In the course of his judgment, Mr. Justice *Holloway* no doubt observes referring to the previous case: "We have recently expressed a strong inclination of opinion that the doctrine as to the power of renunciation does not apply to a person in the position of the Malabar Karnavan." Mr. Justice *Holloway* could scarcely have intended to decide by these two cases that a karnavan cannot renounce his right of management by contract seeing that he had already decided in favour of that view, and the true explanation, therefore, appears to be that he made these observations with reference to the facts of the cases before him or that he was referring only to the renunciation of the natural relationship. If, on the other hand, he meant to say that it is not open to a karnavan to renounce his rights and obligations and in particular the right of managing the tarwad properties which he has by virtue of his position as karnavan, then his view is opposed to his own opinion so expressed in his previous decisions, to the course of subsequent decisions and to the practice amongst the community who follow that law.

Nor is there anything in principle in the position of the karnavan opposed to such renunciation. A karnavan is not a trustee, yet a trustee may renounce his trust with the consent of the beneficiaries or with the sanction of the Court. These restrictions are

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1. 6 M. H. C. R., p. 401.

necessary in the case of a trustee for the protection of the beneficiaries ; but the karnavan is not bound to render account or to pay to the tarwad any surplus he may have in his hands. These reasons, therefore, do not apply to the case of a tarwad where the next male in order of seniority takes the place vacated by the senior.

Shuppu  
Menon  
v.  
Narayanan.

It is decidedly for the benefit of the tarwad that such power of renunciation should be recognized. An unwilling karnavan usually makes a bad manager. Delegation to a junior member, passing over his seniors, will produce discord and in the interest of the tarwad it is clearly desirable that the power of management should be accompanied with responsibility.

If, on the other hand, his renunciation is not irrevocable, the karnavan's own interest and the interests of his wife and children being in conflict with his duty, the tarwad will generally be in danger from his attempts to win back his authority and the inevitable result of refusing to recognize the power of renunciation will be litigation and great loss to the tarwad.

The case before us illustrates the necessity of recognizing the power of renunciation. The tarwad acknowledged the validity of debts contracted by the plaintiff to avoid litigation and gave him an allowance to which as stated by the arbitrator in his award he was not entitled. The renunciation in this case was for full consideration received. That of course will not make the renunciation valid if as a unilateral act of renunciation it cannot be valid.

We are, therefore, of opinion that it is open to the karnavan of a tarwad to renounce his karnavanship including his right to manage the tarwad affairs.

The question referred must, therefore, be answered in the affirmative.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar  
and Mr. Justice Sankaran Nair.

Linga Reddy ... Appellant\* (*Plaintiff*).

v.

Hussain Reddy and another ... Respts. (*Defts.* 1 & 2).

Linga Reddy *Civil Procedure Code S. 244—Surety of judgment-debtor—Suit for exemption from liability—Maintainability of,*  
v.  
Hussain Reddy.

A suit by a person who has become a surety on behalf of a defendant during the pendency of a suit for a declaration that he is not liable to the decree-holder for a portion of the decree is not maintainable and is barred by S. 244 C. P. C.

Second appeal from the decree of the District Court of Kurnool in A. S. No. 118 of 1901 presented against the decree of the Court of the District Munsif of Nandyal in O. S. No. 144 of 1901.

*T. Veerabhadhra Mudaliar* for appellant.

*P. Nagabhushanam* for respondent.

The Court delivered the following

**JUDGMENT :—**The appellant became surety on behalf of the defendant in O. S. No. 596 of 1897 during the pendency of that suit in the Court of first instance. Though the security was taken after the attachment of property before judgment, yet by the security bond the appellant consented to become liable for any sum that might be decreed.

A decree having been eventually passed against the defendant in that suit, application for the execution of the decree was made and granted against the appellant. Before the actual execution of the decree the present suit was brought for a declaration that the appellant was not liable for a portion of the decree sought to be executed against him on certain grounds unnecessary here to be

stated. The order for execution against the appellant was not appealed against. The objection taken on behalf of the respondent that this suit does not lie, the matter being one to be litigated only in execution proceedings must, in our opinion, be upheld on the authority of *Exparte Bhikaji v. Vithal Ambekal*<sup>1</sup>, *Ghoree Lalgha v. Sheo Narain Singh and anothers*<sup>2</sup>, *Akhoof Ramanah and another v. Ahamed Eusoofjee and another*<sup>3</sup>, *Shek Suleman v. Shivram Bhikaji*<sup>4</sup> and *Tirumalai v. Ramayya*<sup>5</sup>, *Rajaram v. Bappu Chettiar*<sup>6</sup>.

Linga Reddy  
v.  
Hussain  
Reddy.

In some of these cases, it is expressly pointed out that the surety should be treated as a party to the suit and as the question sought to be raised by the appellant is one relating to the execution of the decree, the bar to a separate suit laid down by S. 244, C. P. C. applies. On this ground, the suit ought to have been dismissed. We accordingly dismiss this second appeal with costs.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr Justice Davies and Mr. Justice Sankaran Nair.

Thiruvengkata Mudaliar ... Appellant\* (Plff.).

v.

Muthu Aiyar *alias* Mahadeva Aiyar. Respondent (Def.).

*Hindu Law—Judgment against father—Son's obligation—Maintainability of suit—Son may show debt not existent.*

A suit by a creditor against the son of the debtor to enforce the son's duty to pay the debt created by the judgment against his father is maintainable.

The son may show notwithstanding such judgment that the debt is not existent.

Thiruvengkata  
Mudaliar  
v.  
Muthu Aiyar.

Second appeal from the decree of the Subordinate Judge's Court of Negapatam in A. S. No. 773 of 1901, presented against the decree of the Court of the District Munsif of Mannargudi in O. S. No. 423 of 1900.

\* S. A. No. 1304 of 1902.

10th August 1904.

1. 4 B. H. C. R., 119.

4. I. L. R., 12 B. 7.

2. 8 W. R., p. 24.

5. I. L. R., 13 M. p. 1.

3. 15 W. R., p. 538.

6. 13 M. L. J. R. 484.



Thiraven-  
kata  
Mudaliar  
v.  
Muthu Aiyar.

*V. Krishnaswami Aiyar and T. V. Gopalasami Mudaliar* for appellants.

*P. S. Sivaswami Aiyar and C. V. Anantakrishna Aiyar* for respondent.

The Court delivered the following

JUDGMENT<sup>1</sup>:—It is conceded by the pleader for the respondent that, under the Full Bench ruling in *Periasami Mudaliar v. Seetharama Chettiar*<sup>1</sup> this action is maintainable and we must, therefore, reverse the decree of the Subordinate Judge and direct him to replace the appeal on his file and dispose of it according to law. It was contended that the 4th issue in the Munsif's Court raising the question, whether there was any debt due by the defendants father, could not be raised by the son in this suit brought to recover the debt decreed in the judgment against the father, was much as that question was concluded by that judgment. Though no doubt, there are some observations in the judgments of the learned judges in the Full Bench case referred to above, which lend support to this contention, it did not form the subject of the Full Bench decision and we should be reluctant to hold that the son is no longer able to show that the debt which it is being sought to charge upon him is not existent. Their Lordships of the Privy Council fully recognize this right of the son in *Mussamat Nanomi Babuasin v. Modun Mohun*<sup>2</sup> where they observe that sons "ought not to be barred from trying the fact or the nature of the debt" in a suit. We cannot accept the contention that this right is curtailed by the observations of the judges of this Court above referred to.

Costs of this appeal will be provided for by the Subordinate Judge in his revised decree.

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1. I. L. R., 27 M. 243.

2. L. R., 18 I. A. 18.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmania Aiyar  
and Mr. Justice Sankaran Nair.

Gnana Sambanda Pandara Sannadhi . Appellant\* (*Petitioner*).

v.

David Nadar ... Respondent (*Counter-Petr.*).

*Madras Revenue Recovery Act II of 1864, S. 4C—Collector of the District entitled to confirm revenue sale—Power to revise order of Deputy Collector—Restitution—Appeal—No revision.*

Gnana  
Sambanda  
Pandara  
Sannadhi  
v.

No application for revision will lie to the High Court where the order sought to be revised is capable of being appealed against.

Under the Revenue Recovery Act only the Collector of the District is entitled to confirm sales held for arrears of revenue and to issue certificates of sale.

An order of the Deputy Collector confirming a revenue sale is liable to confirmation, modification, or annulment by the Collector of the District under the provisions of Madras Act VII of 1857 taken with Madras Regulation VII of 1828.

Where a District Munsif awards possession under S.40 of Madras Act II of 1864 to a purchaser in revenue auction, he can order restitution on the sale being set aside.

Appeal under S. 15 of the Letters Patent against the Judgment of Mr. Justice Boddam, dated 21st January 1904, in C. R. P. No. 398 of 1903 presented against the order of the Court of the District Munsif of Shiyali, on C. M. P. No. of 1903 in M. P. No. 888 of 1901.

*T. Narasimha Aiyangar* for appellant.

*V. Krishnaswami Aiyar* and *B. Panchapagesa Sastri* for respondent.

The Court delivered the following

**JUDGMENT** :—Certain lands of the appellant were attached for arrears of land revenue due thereon and sold under the provisions of Act II of 1864 (Madras). The sale was confirmed by the Deputy Collector in charge of the Division in which the lands were situated

\* L. P. A. No. 12 of 1904.

3rd August 1904.

Gnana  
Sambanda  
Pandara  
Sannadhi  
v.  
David Nadar.

and a certificate of sale was granted to the respondent, the purchaser at the sale. The respondent having applied to the District Munsif within whose jurisdiction the lands lay, possession thereof was ordered and delivered under S. 40 of Act II of 1864. This delivery took place pending an appeal to the Collector of the District by the present appellant against the confirmation of the sale by the Deputy Collector, and the Collector having in the appeal set aside the sale, the District Munsif who had ordered the delivery of possession to the respondent directed, on the appellant's application, restitution of the land. On application for revision to this Court *Boddum J.*, set aside the District Munsif's order.

The two points which arise for determination are :—

1. Whether it was competent to the Collector to set aside the sale as he did ?
2. Whether the District Munsif had power to grant restitution?

The answer to both these must, it is clear, be in the affirmative.

Now as to the first; under the provisions of the Revenue Recovery Act, confirmation of sales held thereunder and the issue of certificates, etc., are all to be done by the Collector of the District. The exercise of similar power by a Deputy Collector in charge of a Division is by virtue of Act VII of 1857 (Mad.) taken along with the other enactment therein referred to—Mad. Reg. VII of 1828. And cl. 1 of S. 3 of that Regulation has to be taken together with cl. 3 of the same section, and when thus read, it will be seen that the exercise by a Deputy Collector of the powers of a Collector is subject to the complete control of, and supervision and revision by, the Collector of the District who may “confirm, modify or annul” the order of his subordinate and issue “any further order in the case as he may see fit.” We cannot follow the suggestion made by Mr. Krishnaswami Aiyar on behalf of the respondent that the effect of Act II of 1864 is that when once a Deputy Collector in charge of a Division has confirmed a sale, granted a certificate and proclaimed it, the power of the Collector of the District to interfere is at an end. It is quite obvious that no support in favour of this suggestion can be found

in the provisions of the said Act, since according to those provisions the Collector of the District is the only authority entitled to act in such matters and the power of the subordinates of the Collector to deal with the same has to be derived altogether from outside the Act.

Gnana  
Sambanda  
Pandara  
Sannadhi  
v.  
David Nadar.

As to the second point S. 40 of Act II of 1864, which provides for the delivery by a court of competent jurisdiction of possession of lands sold under the Act, lays down that the Court shall cause the proper process to be issued for the purpose of putting such purchaser in possession in the same manner as if the purchased lands had been decreed to the purchaser by a decree of the Court. With reference to this provision, *Muthusami Aiyar and Parker, JJ.*, in appeal against appellate order No. 27 of 1889 held that an appeal lay to the District Judge against an order passed by a District Munsif under the said S. 40 of Act II of 1864, the learned Judges being of opinion that the intention of the Legislature was to place the purchaser for the purpose of recovery of possession of the land purchased in the position of a decree-holder and, that is, entitled to such remedies as are open to a decree-holder in execution proceedings. In this view it follows that the other party to the proceeding can claim and ought to be granted restitution as fully as if he were himself a party to a decree of the court the reversal of which gives rise to the right to restitution.

The order of the District Munsif which was set aside by *Boddam, J.*, was, therefore, one which it was competent to the District Munsif to pass and which in the circumstances was right. It ought to be added that, as according to the decision of *Muthusami Aiyar and Parker, JJ.* cited above, it was open to the present respondent to have preferred an appeal against the order granting restitution no application for revision lay to this Court. The order of the learned Judge is reversed and that of the District Munsif restored with costs of this appeal and of the revision.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—Mr Justice Subrahmania Aiyar, and  
Mr. Justice Sankaran Nair.

Latchmanan Chetty... Appellant\* (2nd Plaintiff).

v.

Ramanathan Chetty (minor) through } Respondents\* (1st Plff's.  
his mother and next friend Alamelu } legal representative and  
Achi and another ... } 1st Defendant).

Latchmanna Chetty v. Ramanathan Chetty. *Civil Procedure Code, S.244—Partition decree—Application for appointing Commissioner—Limitation—Limitation Act, Art. 178—Order rejecting on ground of limitation—Appeal.*

Where a compromise decree is passed for partition and one of the parties apply for the appointment of a commissioner, an order rejecting the application on the ground that it is barred by limitation is a decree and is, therefore, appealable under S. 244, C. P. C.

Such appeal is not taken away by the fact that the court rejecting the application wrongly assumed the existence of a decree to be executed.

An application for the appointment of a commissioner is not governed by Art. 178 of the Limitation Act and is not subject to any rules of limitation.

A court in order to bring the litigation to an end may appoint a commissioner without being put in motion by any party.

Appeal against the appellate order of the District Court of Madura, dated 22nd December 1902 passed in A. S. No. 234 of 1902 presented against the order of the Subordinate Judge's Court of Madura (West), dated 28th April 1902 passed in C. M. P. No. 56 of 1902 in O. S. No. 49 of 1894.

V. Krishnaswami Aiyar and T. Rangaramanujachariar for appellant.

The Offg. Advocate-General (Sir V. Bhashyam Aiyangar) S. Srinivasa Aiyangar and C. V. Ananthakrishna Aiyar for 1st respondent.

The Court delivered the following

JUDGMENT :—The suit out of which the present appeal arises was brought for the partition of a house and some lands to which the parties to the suit were jointly entitled. The parties,

entered into a compromise which was recorded by the Court and according to it the first plaintiff was declared entitled to half a share, the first defendant to one-fourth and the second plaintiff who is the appellant before us, to the remaining one-fourth. Steps for the actual partition and delivery of the respective plots or for the adjustment of the rights of the parties otherwise remained to be taken. The first plaintiff having died, his minor son and representative applied for the appointment of a Commissioner to make a division of the property. The Subordinate Judge dismissed the application on the ground that the first plaintiff's right to claim further relief in the matter had become barred by the law of limitation. On appeal the District Judge reversed the order of the Subordinate Judge and remanded the case for disposal according to law.

Latchmanan  
v.  
Ramanathan  
Chetty.

It was contended before us, as it was in the lower appellate Court also, that no appeal lay to that Court against the order of the Subordinate Judge inasmuch as that order was not one passed in execution of a decree, a decree properly such having had to be passed in the suit after the steps required for division by metes and bounds had been completed.

This contention is clearly untenable. For the order of the Subordinate Judge on the face of it purports to decide a question to be dealt with under S. 244 of the Civil Procedure Code, and is therefore a decree within the meaning of the definition of that term in the Code, and the party against whom it is passed is therefore entitled to appeal therefrom.

Assuming that there was no decree to be executed, that the Subordinate Judge erroneously supposed the matter was one in execution and that he proceeded to decide that the right to obtain such execution was unenforceable by lapse of time, such usurpation of jurisdiction with the object of putting an end to litigation cannot make the order passed in consequence thereof the less appealable than would have been the case had the order been passed in execution proceedings under a decree duly passed. See *Hurriah Chunder Chowdhry v. Kali Sundari Debia*<sup>1</sup> and *Abdul Rahaman Saheb v. Ganapathi Bhatther*<sup>2</sup>.

1. L. R. 10 I. A. pp. 4 and 17.

2. I. L. R., 28 M. 521.

Latchmanan  
Chetty  
v.  
Ramanathan  
Chetty

Nor can we agree with the argument that the application for the appointment of a Commissioner was governed by Art. 178 of Schedule II to the Indian Limitation Act. If the order passed on the compromise did not amount to a decree, it is incumbent on the court to bring the litigation to an end by causing such steps to be taken as will result in the due disposal thereof. The appointment of a Commissioner is one which it was competent to the Court to make without being put in motion by any party to the litigation. And therefore an application by a party with reference to such a matter is not an application of the description contemplated by the article relied on. See *Virthal Janurdhan v. Vithoji Rao Putlaji Rao*<sup>1</sup>, *Darbo v. Kesho Rai*<sup>2</sup> and *Dwarka Nath Misser v. Barinda Nathmisser*<sup>3</sup>.

If, on the other hand, the order on the compromise be regarded as the decree in the case and the application made to the Subordinate Court as one in execution the article applicable would have been Art. 179, and upon the facts admitted, the application was undoubtedly in time. The appeal is, therefore, dismissed with costs.

### IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Boddam and Mr. Justice Bhashyam Aiyangar.

Chintalapudi Neelachalam adu  
another ... .. Appellants\* (*Defendants*).

v.

Chintalapudi Kamarazu ... Respondent (*Plaintiff*).

Neelachalam Madras Act II of 1894—Karnam's emoluments—Possession adverse to office-holder —  
v. Prescriptive title—Suits cognizable by Civil Courts.  
Kamarazu.

The ruling in *Velu Pandaram's* case is also applicable to lands alienated by the holder for the time being of the hereditary office of karnam.

Prior to Act II of 1894 being extended to the office of karnam in a permanently settled district, suits in respect of such office and the emoluments thereof were cognizable by Civil Courts and governed by the ordinary Law of Limitation.

\* S. A. No. 118 of 1902.

8th January 1904.

1. I. L. R., 6 B. p. 586.

2. I. L. R., 9 A. p. 364.

3. I. L. R., 22 C. 425.

A possession, which is adverse to the holder of a Karnam office, is adverse to Neelachalam his successors.

v.  
Kamarasu.

Second appeal from the decree of the District Court of Godavari, in A. S. No. 819 of 1901, presented against the decree of the Court of the Subordinate Judge of Cocanada, in O. S. No. 85 of 1900.

The plaintiff and 1st defendant were brothers. The 2nd defendant was the son of the 1st defendant. The defendants claimed that the suit lands were and are attached to the Karnam's office of which the father of plaintiff and 1st defendant, the 1st defendant and the 2nd defendant, were successively the holders. In 1869 in a partition between the plaintiff and 1st defendant, the suit lands were apparently, treated as private property and fell to the plaintiff's share and were ever since in his enjoyment. The 2nd defendant had been appointed as Karnam recently, and within three years after his appointment sued to recover the suit lands from the plaintiff before the Collector under section 13 of Madras Act III of 1895: The plaintiff contended that the Collector had no jurisdiction to entertain the suit as the suit lands ceased to appertain to the office of Karnam, even if they originally were attached to the said office, by reason of his long adverse possession. The Collector held that the suit was not barred as it was brought within three years after the 2nd defendant's appointment. The decision was confirmed on appeal.

The present suit was brought within 6 months after the appellate decree for a declaration that, as the lands ceased to appertain to the office of Karnam, the Revenue Courts had no jurisdiction to set aside the said decree (S. 21 of 1901, Act III of 1895). Two issues were raised, the first was whether the suit land was the private property of the plaintiff, or whether it formed the emoluments of the office of Karnam held by the 1st defendant; and secondly, whether the plaintiff acquired a prescriptive right to the lands.

The Sub-judge found that the suit lands were originally attached to the Karnam's office but found that plaintiff was in long adverse possession and gave a decree. The District Judge confirmed the



**Neelachalam** decree without giving a finding on the question whether the suit  
**V.** lands were at any time Karnam's emoluments. He agreed with the  
**Kamarasu.** Sub-judge that plaintiff had long adverse possession. Hence this second appeal.

*V. Ramesam* for appellants.

*V. Krishnasami Aiyar* and *S. Gopalasami Aiyangar* for respondent.

The Court delivered the following

**JUDGMENT:**—The District Judge has given no finding upon the 1st issue and we must ask him to return a finding thereon. The determination of this issue also necessarily has an important bearing upon the question of adverse possession—*M. Seshaya v. Gauramma*<sup>1</sup>.

Within the meaning of the Proviso to S. 21 of Act III of 1895 under which section this suit is brought, the plaintiff will be entitled to a decree if the lands were never granted as the emoluments of the office or if at the date when Act II of 1894 was extended to the office of Karnam in the estate in question, the emoluments did not appertain to the office by reason of the plaintiff having acquired (under Article 144 of the 2nd schedule and S. 28 of the Limitation Act) title to the lands by adverse possession prior to such date up to which date suits in respect of the office of Karnam and the emoluments thereof were cognizable by Civil Courts and governed by the ordinary law of limitation by reason of the last section of Regulation VI of 1831 having excepted from it the office of Karnam in a permanently settled district. In our opinion the ruling of the Privy Council in *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*<sup>2</sup>, is applicable as much to lands alienated by the holder for the time being of the hereditary office of Karnam as to lands alienated by the holder of the hereditary office of trustee and limitation runs from such date not only against the alienor but also against his immediate and other successors.

1. 4 M. H. C. R. 336.

2. I. L. R., 23 M. 271.

If the finding on the 1st issue is against the plaintiff, we also request the District Judge to submit a fresh finding upon the 2nd issue with reference to the foregoing observations.

Neelachalam  
v.  
Kamarasu.

We may also point out that the partition deed of 1869 referred to in para. 2 of the District Judge's judgment was between the brothers, the plaintiff and the 1st defendant after the death of their father and not during the father's lifetime, as the Judge appears to think and could not create a separate title in the plaintiff's father and his possession therefore could not have been adverse for that reason to the 1st defendant."

In compliance with the above order the District Judge submitted a finding to the effect that it was not shewn that the suit lands were attached to the office of karnam (1st issue) and with reference to the 1st issue the following was the finding:—

" 3. *Issue II.* Even if my finding on Issue I had been that the suit lands were at one time attached to the karnam's office, I should have held, in the light of the remarks of the High Court in their order of remand, that the suit lands, having been held by the plaintiff since 1869 (under the partition deed Exhibit A) adversely to the 1st defendant, who was then holding the office, the plaintiff had acquired a right to them by adverse possession. The ruling in *M. Seshayya v. Gauramma*<sup>1</sup> does not seem to me to apply to this case, because in that ruling the plaintiff claimed through a person who had himself been karnam when he dealt with the service inam lands as private property; whereas in this case the plaintiff was never karnam and his contention is that he held the lands in dispute adversely to the holder of the karnam's Office since 1869."

[Their Lordships accepting the findings dismissed the second appeal with costs. *Ed.*]

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Davies and Mr. Justice Sankaran Nair.

Subba Reddi and another ... Appellants\* (*Plaintiffs*).

v.

Kotamma and others ... Respondents (*Defendants*,  
1 and 2 and 4 to 8).

Subba Reddi Guardian and minor—Compromise by guardian, validity of.

v.  
Kotamma.

Where a guardian enters on behalf of a minor into a compromise of a doubtful right and has acted in the interests of the minor under the circumstances, such compromise is binding on the minor and the latter cannot seek to set aside the compromise on the ground that the state of things assumed by the compromise was otherwise.

Second appeal from the decree of the District Court of Kistna in A. S. No. 73 of 1902 presented against the decree of the Court of the District Munsif of Tenali in O. S. No. 881 of 1900.

V. Krishnaswami Aiyar and V. Ramesam for appellant.

P. S. Sivaswami Aiyar for respondents.

The Court delivered the following

JUDGMENT :—We must take it that the finding of both the Courts below was that the plaintiffs were bound by the arrangement made by the then guardian, as it was in compromise of a doubtful right. There is no reason for importing any *malafides* to the guardian, who evidently acted in the best interests of the minors by getting for them 4 acres out of the estate which had been in the possession of the 1st defendant for over 12 years. It is contended that now it is found the plaintiffs were in fact entitled to the whole property the 7 acres of which the 1st defendant continued in possession must in the absence of a registered instrument conveying the land to her be delivered to the plaintiffs. This assumes that the plaintiff's ownership was never in doubt. When a state of facts is accepted as the basis of a compromise, parties cannot be afterwards allowed to say the real state of things was otherwise. Having found in favour of the compromise, it was unnecessary to decide in this case as to the ownership of the plaintiffs or the 1st defendant. The second appeal fails and is dismissed with costs.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Bhashyam Aiyangar.

The Madras Consolidated Sugar and Spirit

Factories, Limited... Appellant\* (Defendant).

v.

William Sissmore Shaw and others ... Respondents (Plaintiffs).

*Transfer of debt by creditor—Satisfaction—Taking of pro-note, effect of—Suit to set aside discharge for mistake—Limitation Act XV of 1877 Art. 96—Mistake effect of—Discovery of mistake by one partner, effect of, on another—Contract Act S. 65—Compensation.*

Madras  
Consolidated  
Sugar and  
Spirit  
Factories,  
Limited  
v.  
William  
Sissmore  
Shaw.

A transfer by a debtor to his creditor of a debt due to the former cannot operate as a discharge of his debt unless the transfer is accepted as a satisfaction of the debt and not merely as a means whereby the creditor, on realization of the debt assigned to him, may appropriate the same towards the debt due to him from his original debtor.

There can be no ratification of a part of the agent's act except in the sense that it is a ratification of the whole.

Where a pro-note is taken by the creditor from his debtor there is no discharge of the debt by the creditor.

A suit by a creditor for setting aside a discharge made by him on the ground of mistake is governed by Article 96 of the Limitation Act.

Where the mistake is as to the belief of a party that a third person is liable, the mistake must be taken as discovered when the third person repudiates his liability and communicates such repudiation either to the party or to his partner.

Where a right of action is in two or more partners and one of them discovers the mistake by reason of which a contract (in respect of which relief has been sought) has been entered into by another of the partners on behalf of the partnership the period of limitation prescribed by Article 96, will begin to run from the date of such discovery notwithstanding that the latter partner chooses to persist in his mistake even after the mistake is pointed out to him by the other.

The relief contemplated by S. 65 of the Contract Act is that the party prejudiced by the mistake should be relieved from the consequences thereof.

Where the plaintiffs by mistake released a debt due to them they would be entitled to be placed in the same position as they would be if there had been no

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release and also compensated for any loss which may have necessarily resulted from the mistake.

Where the debt which was released by mistake was on the date of discovery of the mistake not barred by the statute of limitations the party entitled to relief on the ground of mistake could claim no compensation as no loss was sustained. He can only be entitled to a declaration that the release is void and should be cancelled if in writing.

But where the debt released by mistake is barred at the date of the discovery, there is a loss which is the necessary result of the mistake when relief against the mistake will comprise not only a cancellation of the release but also compensation for the loss.

On appeal from the decree of Mr. Justice Boddam, in C. S. No. 160 of 1901.

The facts were as follows :—Messrs. Parry & Co., the plaintiffs sold certain property to the defendant Company under Exhibit D, dated 1st December 1897, for Rs. 7,97,460-11-0.

A pro-note for the amount was taken by Parry & Co. The defendant sold the property they acquired from Messrs. Parry & Co. (plaintiffs) to the East India Distilleries Co., (referred to in the report as the English Company under Exhibit F, dated 14th December 1897, also for Rs. 7,97,460-11-0. The question was whether the value of certain charge &c. (Rs. 89,421-0-5) was separately payable under F, or was included in the said Rs. 7,97,460-11-0. The English Company's contention was that the said claim was included in the price and was not separately payable.

The plaintiff's case was that the defendant was liable to pay them in respect of the agreement of sale, Exhibit D, a sum of Rs. 7,97,460-11-0 and Rs. 89,421-0-5, that upon the English Company purchasing from the defendant all that they acquired under Exhibit D, the arrangement was that the English Company should pay them, the plaintiffs, in consideration of which the latter discharged the defendant Company from their liability to the plaintiffs, that this discharge was under a mistake common to all the parties that the English Company was liable to pay separately for the char, that when the English Company repudiated their liability and their contention was upheld by an award passed on the

4th October 1898 on a reference of the disputes by the English Company and the defendant Company to a common arbitrator. the plaintiffs discovered the mistake and were entitled to set aside the release and get back the sum of Rs. 89,421-0-5. They brought this suit on 2nd October 1901.

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The following are the material portions of the chief documents referred to in the Judgment:—

Exhibit A:—An agreement made the thirtieth day of September one thousand eight hundred and ninety-seven between William Sissmore Shaw Algernon Joseph Yorke and Alexander Stuart Silver Paull, carrying on business together as Merchants Agents and Bankers under the style or firm of Messieurs Parry and Company in Madras and other places (hereinafter called Messieurs Parry and Company) of the one part and the Commercial Bank of India (Limited) a Company registered under the Indian Companies Act VI of 1882 and having its registered office in Madras (hereinafter called the Bank) of the other part. Whereas

The business and assets of Messieurs Parry and Company to be included in such sale shall consist of:—

Para 5 cl. (b)—All the machinery plant offices and other furniture patents licenses, trade marks, horses, wagons, carts, implements, utensils and stores belonging to Messieurs Parry and Company and used by them in connection with their said business.

Cl. (d). All stocks of sugar, raw, or refined jaggery, spirits, molasses, coal, coke and other stocks belonging to and used by them in connection with their said business.

Para. 9:—The consideration for the stock-in-trade of Messieurs Parry and Company and of the Bank as mentioned in clause 5 (d) and 7 (d) hereof shall as regards jaggery and raw sugar be the amount at which such jaggery and raw sugar stood in the books of Messieurs Parry and Company and the Bank respectively on the thirtieth June one thousand eight hundred and ninety-seven exclusive of interest and as regards sugar and spirit and the rest of such stock-in-trade the market value of the same as on the thirtieth day of June one thousand eight hundred and ninety-seven. The consideration monies mentioned in this clause are hereinafter referred to as the "valuation monies".

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Exhibit D :—Para 1. The vendors shall sell and the Company shall purchase. \* \* \*

Secondly :—All the machinery plant, office and other furniture patents, licenses, trade-marks, horses, wagons, cart, implements and utensils belonging to the vendors and used by them in connection with their said business.

\* \* \*

Fourthly :—All stocks of sugar, raw, raw or refined jaggery, spirits, molasses, coal, coke, and other stocks belonging to the vendors or used by them in connection with their said business.

\* \* \*

Para 3 :—The consideration for the stock-in-trade, fourthly, hereinbefore mentioned shall as regards jaggery and raw sugar be the amount at which such jaggery and raw sugar stood in the books of the vendors on the thirtieth day of June one thousand eight hundred and ninety seven exclusive of interest and as regards sugar and spirit and the rest of such stock-in-trade, the market value of the same as on the thirtieth day of June, one thousand eight hundred and ninety-seven. The consideration monies mentioned in this clause are hereinafter referred as the "valuation monies."

*E. Norton and D. Chamier* for appellant.

*The Advocate General and C. F. Napier* for respondent.

The Court delivered the following

JUDGMENT :—BHASHYAM AIYANGAR, J. :—This is an appeal by the defendant, a company incorporated under the Indian Companies' Act against the judgment of Boddam, J., decreeing a sum of Rs. 89,421-0-5 (with interest) in favour of the plaintiffs carrying on business at Madras under the name and style of Parry & Co. The said amount represents the value of a certain quantity of char, bones, &c., which along with other property movable and immovable, was agreed to be sold by the plaintiffs to the defendant Company, under an agreement (Exhibit D) dated the 1st December 1897. The learned Judge has decreed the plaintiff's claim on the ground that the plaintiffs discharged the defendant Company from

its liability to them in respect of the sum of Rs. 7,97,460-11-0—including the above item of Rs. 89,421-0-5—by reason of a mistake, common to both the plaintiffs and the defendant. The mistake was in believing that the East India Distilleries' Company (incorporated under the English Companies' Acts 1862 to 1893) which under an agreement (Exhibit F), dated the 14 December 1897, purchased from the defendant Company all the property which the latter had acquired from the plaintiffs, was under a liability to the defendant company in the sum of Rs. 7,97,460-11-0 including the value of char, &c., (besides the price fixed in Exhibit F in respect of some immovable properties, &c.), whereas, in truth and fact, according to the proper construction of Exhibit F, the value of the char, &c., was included in the fixed price above referred to and the English Company was liable to pay only Rs. 7,97,460-11-0 less the value of the char, viz, Rs. 89,421-0-5. The English Company repudiated its liability to pay for the char, &c., separately; the matter was formally referred on behalf of the two companies to the arbitration of Mr. Davey in England and an award was made by him on the 4th October 1898 in which he held that the English Company's claim was right, and that the value of the char was included in the fixed price, and should be deducted from the sum of Rs. 7,97,460 as 11-0 claimed by the defendant company. The learned Judge being of opinion that the plaintiffs could not have known of their mistake until the award was given, held that the suit was not barred under article 96 of the second schedule to the Limitation Act" the suit having been instituted on the 2nd October 1901; and he awarded the amount decreed as "compensation" under section 65 of the Indian Contract Act, for the loss sustained by the plaintiffs by reason of the release or discharge—which, on the 4th October 1898, they discovered to be void.

Both before the learned Judge who tried the case and before us in appeal, there was a great deal of discussion as to the pleadings in the cause and as to whether the plaint disclosed any cause of action, and if so what, and as to whether the written statement did not admit the release pleaded by the plaintiffs. Paragraphs 4 & 5 of the plaint are not as clear as one might wish, especially in the light thrown upon it by the evidence of Mr. Yorke, one of the plaintiffs, who are themselves the managing agents of the defendant

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company—the company being represented in this suit by Mr. Dick, its attorney, who is also Secretary to the Commercial Bank at Madras, which with the plaintiffs practically constitute the defendant company both having an equal interest therein. I am satisfied, especially after our attention was drawn to the evidence of Mr. Yorke that the word “arranged” in paragraph 4 and the word “arrangement” in paragraph 5 of the plaint were *advisedly* used, as in reality there was no ‘agreement’ in any legal sense of that term between the various parties therein referred to, viz, the East India Distilleries’ Company, the defendant company, the plaintiffs and the Commercial Bank; the arrangement itself when reported to the English Company for its confirmation, having been disapproved of and repudiated by it (as stated in paragraph 6 of the plaint) so far at any rate as its liability to pay for the char, &c. was concerned. I take it—and I believe that was the view taken by Boddam, J.—that the cause of action on which the suit is really based is that averred in paragraph 7 of the plaint, viz., that the plaintiffs released the defendant company from its indebtedness in respect of char, &c., under a mistake, shared in by the defendant company, as to the liability of the English Company to pay for the value of char, &c., taken over from the defendant company under agreement F, and in the mistaken belief that the English Company were prepared to take over the indebtedness of the defendant company to the plaintiffs in respect of the char, &c., and that they are entitled to be relieved from the consequences of such mistaken belief. The contention that the release as pleaded in paragraph 7 of the plaint is, in fact, admitted in the written statement is quite untenable. A reference to paragraphs 4, 5 and 6 of the written statement clearly shows that the admission therein made by the defendant company is not of the release as set forth in paragraph 7 of the plaint, but of a novation by which the English Company, in consideration of the defendant company releasing in from liability to pay the defendant the sum of Rs. 7,97,460-11-0 including the value of char, &c., agreed to pay the same amount to the plaintiffs and the plaintiffs, in consideration of the defendant company having procured the English Company to undertake to pay the amount to the plaintiffs, released the defendant company from its liability to them in the same amount. Leaving out the Commercial Bank—in regard to which there was a similar arrange-

ment from consideration, the defendant understands the arrangement referred to in paragraph 4 and the whole of paragraph 5 of the plaint, as an agreement between the three parties and refers to it as such in both paragraphs 4 and 6 of the written statement. If the defendant company is to be held bound by the admission in the statement, the admission certainly must be taken as a whole and not merely in so far as it relates to the release of the defendant company by the plaintiffs. The question is not whether the defendant company rightly construed the plaint, but what the so-called admission made by it in the written statement is. The defendant admits the arrangement referred to in paragraph 4 of the plaint, referring to the same as an 'agreement' and adds in paragraph 6 of the statement, that that agreement was acted upon and carried out, as alleged in paragraph 5 of the plaint, in which paragraph it is clearly stated that Rs. 7,97,460-11-0 was entered as the loan due by the East India Distilleries' Company to the plaintiffs, the same being the amount due by the defendant company to the plaintiffs. If, as stated by the defendant, the entries and the transfers of the sums, referred to in paragraph 5 of the plaint were in accordance with an agreement to which the English Company was a party, the result of course would be that the suit could not lie, inasmuch as the defendant company, by reason of its release by the plaintiffs, has released the English Company from its liability to it in respect of the same amount; and admittedly the English Company was labouring under no mistake as to its liability under Exhibit F. It is in this view that the defendant pleaded that the suit was bad for nonjoinder of the English Company which was a party to the agreement. The so-called admission of the defendant therefore is really no admission, when taken as a whole, in favour of the plaintiffs, but really a defence in bar of the suit based apparently on a pardonable misconception of the plaint and an ignorance of the fact that there was really no such agreement as the defendant company understood the plaintiffs to aver in paragraphs 4 and 5 of the plaint. Indeed the learned counsel for the defendant offered and applied for leave before the learned Judge to amend the written statement.

Proceeding now to the consideration of the merits of the case and of the cause of action as set forth in paragraph 7 of the plaint,

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I am satisfied, upon the evidence in the case, that the plaintiffs have entirely failed to prove that the defendant was in fact or in law discharged or released from liability to the plaintiffs, in respect of the sum of Rs. 7,97,460-11-0, or any part thereof, by reason of any undertaking of such liability by the English Company. On the contrary the evidence conclusively establishes that the English Company all along regarded and treated the defendant company as its creditor in respect of the amount payable to it under agreement F and that the defendant company was never discharged either in whole or in part from its liability to the plaintiffs by any release or novation, but that the indebtedness of the defendant company to the plaintiffs under Exhibit D was in fact discharged to the extent of the difference between Rs. 7,97,460-11-0 and Rs. 89,421-0-5 (the amount now sued for), only by the plaintiffs—who were also the managing agents of both the English Company and the defendant company—appropriating towards the amount due to them by the defendant company the payments and remittances made by the English Company in discharge of its liability to the defendant company under Exhibit F. If therefore the defendant company was indebted to the plaintiffs under Exhibit D in the sum of Rs. 7,97,460-11-0 for which a pro-note (Exhibit C) bearing date the 31st October 1897 was taken by the plaintiffs from the defendant company on the 23rd January 1898—the defendant's liability under Exhibits D and C would, subject to the law of Limitation, have been a subsisting one, at the date of the suit, to the extent of Rs. 89,421-0-5, the amount sued for,—the balance having been paid to the plaintiffs by the English Company on behalf of the defendant company.

The material portion of the evidence of Mr. Yorke, on the question of the defendant's release is to the following effect :—

The consolidated (defendant company) had been debited in its books with seven lakhs and odd in Parry's favour. After the arrangement of Exhibit F its liabilities were transferred to the E. I. D. Company. Loan accounts were opened in Parry's books and corresponding accounts in the books of the East India (kept here by the plaintiffs as its managing agents). The East India could not have consented to accept the liability of the Consolidated until the East India was itself actually formed. The

circumstances of the whole affair are rather peculiar and the exact date of the East India's consent could not be given. Witness does not know whether between December 1897 and June 1898 there was any document showing the consent of the E. I. D. to take over the liabilities of the Consolidated. Witness himself was not in England any time between December 1897 and June 1898. He did not during that time consult any member of the E. I. D. with regard to the acceptance of the liability, nor is witness aware of any letter of his written during that period to Mr. Murray (the Secretary of the East India as well as the London Agent of Parry & Co.) about the consent of the East India to accept the responsibility of the Consolidated. Witness had no conversation either, with any member of the East India, about that matter. Witness could not find any minute of the Consolidated Directors, transferring the indebtedness of the Consolidated to the East India, nor is there any resolution to that effect. Witness does not recollect whether Parry & Co., as vendors, ever wrote to the consolidated asking the latter to consent to the transfer, nor whether there is any resolution in the books of the consolidated, discharging it from its liability. The books of the consolidated contain no entry regarding the transfer of its indebtedness to the East India Distilleries. Witness does not know (or is not prepared to say) on what date or in what month or year, the Consolidated was discharged by the plaintiffs. Witness himself never used the word 'discharged' to his legal advisers, nor could he say what was released and what was not. Witness does not know of any discharge *in fact*. This discharge is purely a legal fact and witness does not know when the legal discharge took place.

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Turning now to the entries in the account books, the matter stands thus:—In M 1—the defendant company's book—the plaintiffs are on the 31st December 1897 credited with Rs. 7,97,460-11-0 and by a corresponding entry in the plaintiffs' book (Exhibit 130) the defendant company is debited with the same amount. On account of losses sustained in the working of the defendant company (by the plaintiffs and the Commercial Bank) before its business was transferred to the East India Company, a sum of Rs. 74,597-2-2 (being one-half of the total loss) was debited to the plaintiffs in M 1 and credited to the defendants in Exhibit 130.

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This amount was deducted (after the same had been ascertained apparently about June 1898) from the above sum of Rs. 7,97,460-11, both in M 1 and 130, leaving a balance of Rs. 7,22,863-8-10. The defendant company's book was closed with this and no subsequent entries appear there. In the plaintiffs' books, however, the sum of Rs. 7,97,460-11-0 was carried over to the next year's account under date the 1st January 1898 (Exhibit DD) under the heading of the defendant company. This heading, however, was subsequently scored out and the name of the 'E. I. Distilleries' Company,' appears there in pencil; the figure 7,97,460-11-0 has been altered into 7,22,863-8-10. Mr. Knight, as plaintiffs' second witness, says, in explanation of this—"The alteration was made in my own writing because the heading was wrongly made by the clerk. I can't give the exact date. When I examined the entry, I found the wrong entry in the ledger. \* \* The balance (Rs. 7,97,460-11-0) might have been brought forward two or three months after the 1st January \* \* \* it was altered into Rs. 7,22,863-8-10 about June 1898." In the corresponding accounts of the E. I. D. Company (Exhibit P2)—kept by the plaintiffs here—the plaintiffs are credited with the sum of Rs. 7,22,863-8-10 under date the 1st January 1898. Here too, as in DD, there is a scoring out of the figure Rs. 7,97,460-11-0, which has been altered to Rs. 7,22,863-8-10. If in reality there had been a discharge of the defendant's liability by the English Company undertaking the same, it is remarkable that instructions should not at once have been given to the clerk not to continue the account (in 1898) in the name of the defendant company, and that the clerk should have been left to continue the account in that name, and that the mistake should have been discovered only casually, some time afterwards, by Mr. Knight. Further, if it had been intended to discharge the defendant company of its liability to the plaintiffs, an entry would surely have been made in Parry & Co's books crediting the defendant company with the amount, and a corresponding debit entry made in the defendant's book. No such entry, however, appears in Exhibit 130 or Exhibit M1 or anywhere else and in fact the matter was left unadjusted so far as the accounts go. Mr. Knight's explanation that that is the usual method of book-keeping is really no explanation at all, if, in truth and fact, a discharge was really intended. That no discharge—in any legal sense of the term—was

ever intended receives further corroboration from the fact that no discharge had been endorsed on the defendant company's pro-note, Exhibit C. Nor is it at all likely that the plaintiffs would have discharged the defendant company before the English Company—of which the plaintiffs were the managing agents—had signified its acceptance of the defendant company's liability to the plaintiffs in the sum of Rs. 7,97,460-11-0. The above entries in the accounts were no doubt made in the usual course of business under the belief that the indebtedness of the English Company to the defendant company on account of the articles to be paid for on valuation (under Exhibit F) was the same as that of the defendant company to the plaintiffs and, as stated by Mr. Yorke in his evidence, that the English Company would take the liability including the char and that instead of making a two-fold entry, first in the defendant's book crediting the English Company with the amount and then in the plaintiffs' books crediting the defendant company with the same, the matter might be adjusted by a single entry in the plaintiff's books (of course with a corresponding entry in the English Company's books kept by the plaintiffs here), crediting the English Company with the amounts paid—thus practically discontinuing entries in the defendant's book. That this was all that was really intended, clearly appears from Exhibit 9, dated (so late as) the 12th September 1898—being a letter from Parry & Co. as managing agents of the defendant company to Mr. Stranack, one of the directors of the defendant company and Secretary to the Commercial Bank. There was thus in reality no transfer—in any legal sense—of any debt or liability, operating as a discharge or release of the defendant's liability. I may here mention that a transfer by a debtor to his creditor, of a debt due to the former, cannot operate as a discharge of his debt, unless the transfer is accepted as a satisfaction of the debt and not merely as a means whereby the creditor, on realization of the debt assigned to him, may appropriate the same towards the debt due to him from his original debtor (*vide* S. 134 of the Transfer of Property Act). The transfers made (in the various sets of books) by the plaintiffs, who were the managing agents of the English Company, were, as understood by the parties themselves, made subject to and in expectation of their being approved and confirmed by the company—in the mistaken belief, no doubt, that the company was, under Exhibit F, bound to

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pay separately, for char &c. If the plaintiffs, as managing agents, had legal authority to bind the English Company by their act, the English company would of course be bound thereby and it could not have repudiated, as it did, its liability in respect of char. But if the plaintiffs had no such authority—and this is conceded—their acts can bind their principles only if they ratify the same. And it is clear law that there can be no ratification of a part of the agent's act except in the sense that it is a ratification of the whole (*vide* Indian Contract Act, S. 199, Story on Agency, S. 250). That the English Company did not ratify the whole is of course clear and is conceded. It seems to me therefore impossible to hold that there was any novation whereby the liability of the English Company was substituted for that of the defendant company even to the extent of the admitted liability of the English Company to the defendant company under Exhibit F or the defendant company discharged by the plaintiffs either in whole or in part. There is nothing in Exhibit S to which our attention was specially drawn by the learned counsel for the respondent—which militates against this view. At the most all that can be contended is that after the English Company had repudiated its liability to pay separately for char, &c., and such repudiation had been upheld by the arbitrator, the English Company undertook the defendant's liability to the extent of the admitted sum, the liability of the defendant company to the plaintiffs, for the balance of Rs. 89,000 and odd remaining as before. As regards the remittances made by the English Company from time to time, in liquidation of its indebtedness to the defendant company, it may be taken that the appropriations thereof, made by the plaintiffs towards the debt due to them by the defendant company, were ratified by the English Company. In my opinion, however, there was, even after the award, no novation or transfer in law to the plaintiffs, of the admitted indebtedness of the English Company to the defendant company. The taking of the pro-note (Exhibit C) from the defendant company on the 23rd January 1898 is quite incompatible with any transfer prior thereto, of its liability or any discharge of such liability. The explanation given that the Commercial Bank wanted a pro-note (for the debt due to it by the defendant company) as a voucher and that the plaintiffs also therefore took a similar pro-note (for the amount due to themselves) antedating the same to the 31st October 1897

affords no explanation for a pronote being given after the debt for which it was given had been discharged, and that, with no endorsement of discharge thereon. If really the pro-note was required merely as a voucher for purposes of audit, there was no reason why the discharge should not have been endorsed thereon, if really there had been any such, by the transfer of the liability to the English Company.

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That there was no novation in any sense or any transfer of liability is conclusively established by the fact that the English Company regarded and dealt with the defendant company as its creditor, even as late as October 1898, when the question of its liability to pay for char separately was referred to arbitration.

In reply to Exhibit 124, dated the 12th May 1898, in which the valuation of the stocks by Parry & Co., was sent to the English Company, including therein the value of Char &c.,—the Secretary to the English Company in his letter (Exhibit 2), dated the 29th July 1898, informs the plaintiffs of the resolution of the company that it is not bound to pay for the char separately, requesting them to communicate that decision to the defendant company—its vendors. The plaintiffs, in their reply (Exhibit 8), dated the 25th August 1898 to this letter, maintain the position that the English Company is bound to pay separately for char and express their willingness to have the matter referred to the arbitration of some independent party to be approved by their attorneys in England. It is evident that this letter was written by the plaintiffs on behalf of the defendant company—of which they were the managing agents—and they also point out in the letter that the reference already made by the English Company to Messrs. Newlands Brothers was not one to which they or their attorneys were parties. Exhibit 10, dated the 16th September 1898, is the reply (to this) addressed to the managing agents of the defendant company informing them that their letter (Exhibit 8) of 25th August will be placed before the Board (of English Company) at its next meeting and intimating that the reference to Newlands Brothers was made only in accordance with the wishes of the attorneys of the defendant company. The resolution of the Board, dated the 28th September referring the matter to the arbitration of Mr. Davey, with



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the assent of Mr. Herbert the English attorney of the defendant company (*vide* Exhibit 12), as well as the reference to, and the award of, Mr. Davey was communicated to the plaintiffs as managing agents of the defendant company by Exhibit 14, dated the 7th October 1898. The award was in favour of the English Company and it is significant that two of the Directors of the defendant company, who were then in England, Messrs. Shaw (the 1st plaintiff) and Orr, sent a letter (Exhibit 11) dated the 27th September 1898, before the reference was made to Mr. Davey, to the defendant company, conveying their opinion that the contention of the English Company in the matter was right and stating that the English attorneys of the defendant company were parties to the reference to Newlands Brothers and that it was highly undesirable in the interests of the defendant company to endeavour to reopen the question even if such a course was possible. It also appears from Exhibit 9, dated the 12th September 1898, that the Secretary to the English Company desired its managing agents—the plaintiffs—to obtain receipts from the defendant company for payments made by the English Company in respect of stocks purchased from the defendant company.

If the defendant company had been discharged and its liability to the plaintiffs undertaken by the English Company, it is inconceivable that Exhibit 8 would have been dealt with as a communication made on behalf of the defendant company, or the dispute submitted to arbitration as one between the English Company and the defendant company. The parties to the arbitration were only the two companies, neither the plaintiffs nor the Commercial Bank being made parties thereto, and the award would not have bound the plaintiffs—if really the debt due by the English Company to the defendant company had been transferred to them. Exhibit 11 also shows that two of the Directors, at any rate, of the defendant company considered that the defendant company was then the creditor of the English Company. These circumstances and the fact that the English Company desired the plaintiffs to obtain receipts from the defendant company completely negative the theory of novation and with that, the alleged discharge or release of the defendant company by the plaintiffs necessarily falls to the ground. Even assuming that there was a release or

discharge of the defendant company as pleaded in paragraph 7 of the plaint, the suit is, in my opinion, clearly barred by the Law of Limitation under Articles 96, 52 and 73 of the second schedule to the Limitation Act. As regards article 96 it is impossible to accede to the contention that the mistake as to the extent of the English Company's liability must be taken to have been discovered only on the date of Mr. Davey's award (Exhibit W) *viz.*, the 4th October 1898—though the plaintiffs themselves were no parties thereto. The mistake which led to the release of the defendant company in respect also of the value of char, &c., is, as alleged in paragraph 7 of the plaint, the supposition by the plaintiffs and the defendant company that under Exhibit F the English Company was liable to pay separately for char, &c., taken over from the defendant company and the belief that the English Company was prepared to take over the indebtedness of the defendant company to the plaintiffs in respect of such char, &c. Assuming that such a mistake on the part of Mr. Yorke should be treated as the mistake of all the plaintiffs and that it would therefore render the lease void under section 20 of the Contract Act, the mistake must be taken to have been discovered on or about the 15th August 1898 at the latest when Exhibit 2, dated the 29th July 1898, would in the ordinary course have reached Mr. Yorke, communicating the decision of the English Company that it repudiated its liability to pay separately for the value of char, &c. In fact, the mistake must, in law, be taken to have been discovered on the 21st June 1898—the date of Exhibit 3—when Mr. Shaw (the 1st plaintiff who was then in England) knew that the English Company objected to its having to pay separately for char, &c., and wrote to Mr. Yorke (in Madras), who, he knew, was labouring under a mistake that he (Mr. Shaw) had always entertained the opinion that char, &c., was included in the fixed price. If in a case in which the right of action is in two or more partners, one of them discovers the mistake, by reason of which a contract—in respect of which relief is sought—has been entered into by another of the partners, on behalf of the partnership, the period of limitation prescribed by Article 96 will begin to run from the date of such discovery notwithstanding that the latter partner chooses to persist in his mistake, even after the mistake is pointed out to him by the other. In the present case even after the receipt of Exhibits 2 and 3, Mr. Yorke, as agent of the defendant

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company, addressed a letter (Exhibit 8) to the Secretary to the English Company maintaining his former mistaken position and demanding a reference to an independent arbitrator. The argument that the repudiation by the English Company, communicated to the plaintiffs by Exhibit 2, should not be taken as final, but only provisional pending the reference to arbitration proposed in Exhibit 8 and acceded to by the English Company (*vide* Exhibit 14) and that therefore the mistake should be taken to have been discovered only when Mr. Davey's award was made, is entirely inadmissible. So far as the English Company was concerned, the repudiation (in Exhibit 2) was distinct and final, though notwithstanding such repudiation the defendant company maintained its own position. In the ordinary course of things, the dispute would have necessitated recourse to a court of law, but in lieu of it the parties agreed to submit it to arbitration, the award wherein binds the parties, substantially in the same way as a judgment of court, but so far as the plaintiffs—who were no parties to the submission to arbitration—are concerned, it is difficult to see on what principle the date of Mr. Davey's award can give them a starting point of limitation. No doubt, as between the parties thereto, the period of limitation for a suit to enforce or set aside the award will begin to run from the date of the award. But so far as the plaintiffs are concerned, it would have been perfectly open to them to have sued the English Company the very next day after the award for the value of char, &c., if, as alleged by them, they had become the transferees of the defendant company's claim (under Exhibit F) against the English Company and in such a suit the plaintiffs would not have been bound by Mr. Davey's award and would have been entitled to a decree if the Court accepted Mr. Yorke's construction of Exhibit F. In the present suit likewise the defendant company would not, for the like reason, be bound by Mr. Davey's award, if a question had been raised as to the right construction of Exhibit F, and the Court should hold that, under that agreement, the English Company was liable to pay separately for char, &c. Mr. Yorke was fully in possession of all the facts as to the discovery of the mistake, as early as July and August 1898, but if in spite of it he persisted in his mistake, he must take the consequences and the operation of the law of limitation will not be postponed for him.

Even if the 4th October 1898 be taken as the date of discovery of the mistake and therefore the starting point for limitation under Article 96, the suit so far as it seeks to recover from the defendant company the sum of Rs. 89,421-0-5—whether this be regarded as the balance due under the agreement (Exhibit D) or the promissory note (Exhibit C)—is clearly barred under Articles 52 and 73 of the Limitation Act, though the suit may be within time so far as the setting aside of the alleged release is concerned. The relief contemplated by section 65 of the Contract Act and Article 96 of the Limitation Act is that the party prejudiced by the mistake should be relieved from the consequences thereof. In the present case the direct consequence of the mistake was the alleged release of the defendant company and the plaintiffs would be entitled to be placed in the same position as they would be in if there had been no release and also compensated for any loss which may have necessarily resulted from the mistake. The question, therefore, is whether the sum sued for was lost to the plaintiffs by reason of mistake or whether the same has been lost by reason of their laches even after the discovery of the mistake, on the 4th October, 1898. If at the time of the discovery of the mistake the remedy of the plaintiffs against the defendant company to recover the debt which had been released by reason of the mistake, was not barred, the plaintiffs could not be regarded as having by reason of the mistake lost the money due to them, and they could therefore claim no compensation for loss sustained; the only relief they would be entitled to, on the score of mistake would be a declaration that the release is void and should be cancelled (if in writing). If, however, the plaintiffs' remedy had become barred at the date of the discovery of the mistake, they could no longer have sued for the recovery of the debt and such loss being the necessary result of the mistake, relief against the mistake would comprise not only a cancellation of the release, but also compensation for the loss. Even if the mistake is taken to have been discovered on the 4th October 1898—the date of the award—the plaintiffs' remedy against the defendant company, whether under Exhibit D or Exhibit C, was not then barred and they had nearly two years thereafter within which they might have instituted a suit to have the release declared void *in toto* or inoperative, so far as the claim for char was concerned, and to recover the sum now sued for. If at the date of the present

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suit their claim under Exhibit D or C is barred, the loss is the result not of the mistake, but of their own laches, after the discovery of the mistake. The sum of Rs. 89,421-0-5 claimed by the plaintiffs in the present suit cannot therefore be awarded as 'compensation' for loss sustained by reason of the alleged mistake, within the meaning of section 65 of the Contract Act and Article 96 of the Limitation Act but only as balance of the price or debt due under Exhibit D or C if the recovery of the same had not already been barred by limitation.

Article 97 of the Limitation Act has no application whatever to the present case, for in no view can the plaintiffs be regarded as suing for the recovery of money paid by them to the defendant company upon an existing consideration which has afterwards failed. In *Bassu Kuar v. Dhum Singh*<sup>1</sup> which was relied upon on behalf of the respondent, the debtor was allowed to retain the debt due by him as part of the purchase money pending the completion of an agreement for sale of lands by the debtor to the creditor. The Privy Council held that the debt so obtained was real part-payment of the consideration for the sale and that a suit by the vendee-creditor to recover the amount on failure of the sale (by the decree of the Appellate Court in a suit for specific performance brought by the debtor-vendor against the creditor vendee) was governed by Article 97 of the Limitation Act and having been brought within three years from the date of the decree was not barred. The decision of the Privy Council in *Hanuman Kamat v. Hanuman Mandur*<sup>2</sup> relied on on behalf of the appellant, is also a decision on Article 97; and neither of these decisions has any bearing upon the question of limitation arising in the present case. The latter case, however, lends some support to the appellant's contention that the plaintiffs must be taken to have discovered the mistake when the English Company repudiated its liability to pay for char, &c. It was also urged on behalf of the respondents that the suit might be viewed as one for damages for breach of implied warranty by reason of the defendant company having assigned and transferred to the plaintiffs a larger debt than was really due to it from the English Company. I have already stated at sufficient length that there was no transfer or assignment

1. I. L. R., (P. C.) 11 A. 47.

2. I. L. R., 19 C. 123.

3. L. R., 2 P. B. D. p. 658.

in law of any debt due by the English Company to the defendant company. Even in the view contended for, the breach of warranty would have occurred at the date of the transfer and the suit would be barred under Article 115 and would not be governed by the six years' rule of limitation prescribed by the residuary Article 120.

On the question, which was argued to considerable length on both sides—as to whether the defendant company is really liable to pay separately for char, &c., under Exhibit D,—if the English Company was not so liable under Exhibit F,—I am of opinion that, according to the right construction of Exhibit D, the defendant company was not so liable and that, in regard to Exhibit D, both the plaintiffs and the defendant company acted under the same mistake as in regard to Exhibit F. If the plaintiffs are entitled to relief as against the defendant, on the ground of mistake, the defendant company is equally entitled to counter-relief in respect of the mistake, under which it undertook to pay separately for the char, &c., and gave a pro-note including the value of char, &c. In the amalgamation agreement Exhibit A 'stores' were included in clause (b) of paragraph 5, but in the corresponding clause, paragraph 1 secondly, of Exhibit D, that term is omitted. Whether the omission was accidental or intentional does not, in my opinion, make any difference as to the question whether the char, &c., should be paid for separately or its value is included in the fixed price. Both under Exhibit A (paragraph 5, cl. (d) and under Exhibit D (paragraph 1 fourthly) 'all stocks of sugar, raw or refined, jaggery, spirits, molasses, coal, coke and other stocks used in connection with the business,' were to be valued and paid for separately. These are referred to as 'stock-in-trade' both in Exhibit A (paragraph 9) and Exhibit D (paragraph 3). There is no evidence in the case to show that 'char, &c.,' has any technical or provincial meaning. 'Char, &c.,' are used as aids to the manufacture of sugar and are not intended for sale. They are not therefore 'stock-in-trade' and cannot be comprised in the expression 'other stocks' occurring in 'paragraph 1 fourthly' of Exhibit D. I therefore hold on the authority of *Re Richardson*<sup>1</sup> (44 L. T. 404) that 'char, &c.,' are not 'stocks' (see also per Lindley, L. J., in *Yarmouth v. France*<sup>2</sup>, *vide* the term 'stock-in-trade' in Stroud's Judicial Dictionary) and cannot therefore be

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1. 44 L. T. 404.

2. 19 Q. B. D. 647.

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required to be separately paid for. In Exhibit A they will properly be included in the term 'stores' occurring in cl. (b) of paragraph 5 and in Exhibit D in the expression 'all other property' occurring in 'paragraph 1 fifthly'—as the term 'stores' is omitted in paragraph 1 'secondly' whether accidentally or intentionally. In Exhibit F—which was executed in England on the 14th December 1897, before D could have reached England—the term 'stores' is reproduced from A in cl. (b) of the 1st and 2nd Schedules thereto, cl. (d) being identical with paragraph 5, cl. (d) of Exhibit A and paragraph 1 'fourthly' of Exhibit D (already referred to). Notwithstanding that the word 'stores' is specifically included in cl. (b) of Schedules 1 and 2 to Exhibit F, in the list of articles not to be paid for separately. Mr. Yorke and the defendant company maintained, though unsuccessfully, that under Exhibit F, 'char, &c,' should be paid for separately as coming under the head of 'stocks' and this is the very identical mistake under which they laboured with reference to Exhibit D. Having regard to the conduct of the parties, I find it impossible to conclude that in giving effect to A (the amalgamation agreement), they in any way intended to vary the same in Exhibit D as to the items to be included in the fixed price and those to be paid for separately on valuation. Had there been any such intention, the recitals in the preamble to Exhibit D would not have run as they now do, *vide* also paragraph 6 of the proceedings of the defendant company, dated 19th October 1897); on the contrary it would have been expressly recited that the amalgamation agreement was being carried out with a variation (in regard to the matter in question) as agreed to between the parties. Further, if the term 'stores' had been omitted in paragraph 1 'secondly' of Exhibit D, in order that the same might be included among the articles to be valued and paid for separately, one would expect to find 'stores' transposed to and included in paragraph 1 'fourthly' just as 'molasses, coke and coal' which are only aids to the manufacture and not 'stock-in-trade' are included there, as also in paragraph 5, cl. (d) of Exhibit A. If there was any such intention, and it was supposed that the intention was effectuated by the omission of the word 'stores' in Exhibit D, it is also inconceivable that in transferring the business from the defendant company to the English Company, care would not have been taken to omit that word in Exhibit F also. The truth is that

Mr. Yorke and the defendant company and the Commercial Bank were all along under a common mistake that, under all the agreements, viz., Exhibits A, D, E and F, 'char, &c.' was among those items to be paid for separately, as 'stock'—though Mr. Shaw and two of the directors of the defendant company were all along of a contrary opinion (*vide* Exhibit 11)—and the mistake in respect of Exhibit F cannot be distinguished from the mistake in respect of Exhibit D. The result therefore is that if the plaintiffs released or discharged the defendant company from their liability to pay for char, &c., under the mistaken belief that the English Company was liable to pay for the same under Exhibit F, the release was really in respect of a non-existent liability, which, however, the parties erroneously supposed to exist. In this view also the plaintiffs' suit fails.

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The questions as to what are mistakes 'of fact' and 'of law' within the meaning of Ss. 20 and 21 of the Contract Act, whether a mistake in the construction of an instrument is 'a mistake of fact' or 'of law' and whether independently of the Contract Act, relief can be given against mistakes of law—with reference to S. 21 (*h*), 26 (*a*), (*b*) and (*d*), 28 (*c*), 31, 33 and 36 of the Specific Relief Act and other equitable principles—and if so, in what cases, are points of considerable difficulty and import, and as the question does not really arise in the case, and the materials on record with reference to which the question has to be decided are imperfect, I refrain from considering the cases cited and expressing any opinion on the point.

I would therefore allow the appeal with taxed costs and reversing the judgment appealed against, dismiss the suit with taxed costs. Having regard to the length and importance of the case the costs will include the cost of the English Commission, and of interlocutory applications the costs of which were to be costs in the case. Costs throughout will be allowed on the higher scale admissible under the rules, and two counsel throughout.

BENSON, J. :—I concur throughout.

RUSSEL, J. :—I concur with the main conclusions, and the reasons given therefor, arrived at by my learned colleague in the judgment just read.



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I do not, however, agree with the construction which has been placed on Exhibit D as to the liability or otherwise of the defendant company to pay separately for 'char.' In my opinion, under Exhibit D, the parties deliberately arranged and contracted that 'char' should be paid for separately and the document is legally capable of being interpreted in that sense. I will not labour the point further than merely to express my opinion. The point is not now material in this case owing to the views taken by the Court as regards the other portions of the case. I desire, however, to express myself as being strongly of opinion that it would be a great misfortune if mercantile people or others were led to entertain the view that a document deliberately drawn up and acted upon could be readily set aside at the instance of either in a court of law.

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### IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar and Mr. Justice Boddam.

Venkata Hanumanulu Garu ... \* Appellant (*Plaintiff*).

v.

Lachchamma and others ... Respondents (*Defendants* 1,  
2 to 8, 10 and 13 to 15).

Venkata  
Hanumanulu  
Garu  
v.  
Lachchamma.

*Limitation Act, Art. 141—Onus of proof as to the date of widow's death—Widow last heard of toprior twelve years before suit—Presumption as to time of death—Evidence Act, Ss. 107, 108.*

In a suit by a reversioner for possession of lands on the death of a widow the onus is on the plaintiff to show that the suit is brought within 12 years from the widow's death. Where it was proved that the widow was last heard of on a date prior to 12 years before suit, *Held*, that it lay upon the plaintiff to prove that the widow died within twelve years prior to suit; and in the absence of such proof his suit should fail. When the question is not one of death, but death at a particular time, there is no presumption as to such time, but the party who has to make out death at a particular time, must make it out by evidence.

Second appeal from the decree of the District Court of Godavari, in A. S. No. 839 of 1901, presented against the decree of the

Court of the District Munsif of Bhimavaram in O. S. No. 69 of 1899. Venkata  
Hanumanulu  
Garu  
v.  
Lachchamma.

*V. Krishnaswami Aiyar* and *K. Subrahmanya Sastri* for appellant.

*T. R. Ramachandra Aiyar* and *V. Ramesam* for respondents.

The Court delivered the following

**JUDGMENT** :—The appellant, on the 20th June 1898, brought this suit for the recovery of lands which had been held by a Hindu female on the ground that he was under the Hindu Law, the reversionary heir entitled thereto on her death.

The question is whether the suit is barred by limitation. Art. 141 of the Limitation Act is, of course, the article governing the case, and under it, if the suit is brought within 12 years from the death of the female, it will be in time—otherwise it will be barred. It, therefore, lay on the plaintiff to show that, on the date of the presentation of the plaint, his claim was not barred, that is to say, he had to show that the death of the female occurred, or must be taken to have occurred, within twelve years prior to the institution of his suit.

No evidence as to this was called on behalf of the plaintiff. No doubt the present case proceeds on the footing that the female was dead on the date of the suit, as she had not been heard of for seven years, from her disappearance in 1886, and she was, therefore, presumed to have been dead at the expiry of the seven years. It is settled law that when the question is not merely one of death, but death at a particular time, there is no presumption as to such time, but that the party who has to make out that the death occurred on a specified date, must prove it by evidence. As, in our opinion, it lay on the plaintiff, under Art. 141 of the Limitation Act, to prove that the suit was brought within the prescribed period and he has not discharged that onus, the point must be decided against the appellant. On this ground, we confirm the decree of the lower appellate Court and dismiss the appeal with costs.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Boddam and Mr. Justice Sankaran Nair.

The Karur Municipal Council	...	...	Appellant *
	v.		(Defendant).
K. Srinivasa Aiyangar	...	...	Respondent.

Karur  
Municipal  
Council  
v.  
K. Srinivasa  
Aiyangar.

*Tort—Suit for damages for injury to wall—Contributory negligence.*

In a suit for damages for injury to the plaintiff's wall, it was found that plaintiff's damage was contributed to by plaintiff's letting his domestic refuse water into the drain, and was not caused solely by any acts or omissions of the defendants.

*Held* :—That the plaintiff was not entitled to any relief.

Second appeal from the decree of the District Court of Coimbatore in A. S. No. 104 of 1901, presented against the Decree of the Court of the District Munsif of Karur in O. S. No. 115 of 1900.

*T. V. Seshagiri Aiyar* for appellant.

The Court delivered the following

**JUDGMENT**:—Upon the findings it seems clear that the plaintiff's suit should have been dismissed. It is found by the District Munsif and also by the District Judge who adopts his findings in effect that the immediate cause of injury to the plaintiff's walls was not the flowing of water into the drain, but the stagnation of the water and sewage let into it by the plaintiff and the consequent corrosion and pressure on the walls of the plaintiff's house. The District Judge also says that "there would have been no stagnation of water had plaintiff, more especially some of his neighbours, not let their domestic refuse water into the drain.

It is, therefore, clearly, found that the plaintiff's damage was contributed to by the plaintiff's own acts and was not caused solely by any acts or omissions on the part of the defendants.

We, therefore, set aside the decrees of the Courts below and dismiss the plaintiff's suit with costs throughout.



Ammayi  
Ammal  
v.  
Rathna  
Pathan.

We are clear, that in this case the actual property was the subject-matter of the mortgage and not merely the equity of redemption, and are of opinion that the prior mortgagee was a necessary party to the appeal.

We, therefore, set aside the decree of the lower appellate Court and direct that the prior mortgagee be made a party to the appeal and that the appeal be retaken on the file of the lower appellate Court and disposed of according to law. The costs will abide and follow the event.

### IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmanya Aiyar and Mr. Justice Sankaran Nair.

Maharajah of Vizianagram being minor, by

Collector and guardian H. F. A. Gilman, Esq. \*Appellant

(Transferee  
decree-holder).

v.

Chelliah

...

...

...

...

Respondent

(Petitioner, 1st  
defendant).

Maharajah  
of  
Vizianagaram  
v.  
Chelliah.

*Madras Act III of 1895—S. 5.—Service Inam—Inalienable character of inam—Decree for sale—Jurisdiction—Waiver—Estoppel.*

The provisions contained in S. 5 of Madras Act III of 1895 are absolute and Civil Courts have no jurisdiction to order sale of inam properties falling within the scope of the Section.

A Court cannot pass a decree for sale of properties declared in-alienable by statute, on considerations of Public Policy. If the interdiction upon alienation be only for the benefit of particular persons, or for reasons not based on considerations of public policy, it will be open to parties to waive their objections as to the non-alienable character of the property and be estopped by a decree passed as against them; but where the enactment has as in the case of S. 5 of Madras Act III of 1895, some object of public policy in view, the rule is to enforce the prohibition literally and strictly and no question of waiver or estoppel will arise. *Vasenji Haribhai v. Lallu Akhu<sup>1</sup>, Sadashiv Lahit v. Jayanti Bai<sup>2</sup>, Narayanas Khanlu Kulkarni v. Kelgaunda Birdar Patel<sup>3</sup>* distinguished.

Appeal against the appellate order of the District Court of Vizagapatam, passed in A. S. No. 162 of 1903, presented against

\* A. A. A. O. No. 5 of 1904.

10th August 1904.

1. I. L. R., 9 B. 285.

2. I. L. R., 8 B. 185.

3. I. L. R., 14 B. 404.

the order of the District Munsif of Vizianagaram, passed in M. P. No. 170 of 1903 in E. P. No. 574 of 1902 (as No. 717 of 1897).

Maharajah  
Vizianagaram  
v.  
Chelliah.

*T. Rangachariar* for appellant.

*V. Ramesam*, for respondent.

The Court delivered the following

**JUDGMENT:**—The appellant, the Maharajah of Vizianagaram, obtained a decree *ex parte* against the respondent on a mortgage, and it contained an order for the sale of the mortgaged land. Though the record prior to, and inclusive of, the decree makes no allusion to the fact, yet, in the subsequent proceedings, the land is admitted to be service inam being the emoluments attached to the office of village carpenter, which is among the offices comprised in the Madras Hereditary Village Offices Act (Act III of 1895). Section 5 of that Act runs thus, “The emoluments of village officers, whether such offices be or be not hereditary, and, in the scheduled districts as defined in the Scheduled Districts Act, 1874, all such emoluments and other emoluments granted or continued in remuneration for the performance of duties connected with the collection of the revenue or the maintenance of order shall not be liable to be transferred or encumbered in any manner whatsoever, and it shall not be lawful for any Court to attach or sell such emoluments or any portion thereof.” With reference to this section, the lower appellate Court refused to cause the sale to be held notwithstanding the direction for sale contained in the decree.

On behalf of the appellant, it is contended that, as between the parties to the decree, the order for sale therein contained must be carried out, notwithstanding the prohibition of law relied on by the lower appellate Court. If the interdiction upon alienation by parties or attachment or sale by court were merely for the benefit of particular persons, it would, no doubt, be open to them to waive the benefit introduced in their favour and, on such waiver, the transfer could be given effect to, and a sale, necessary for that purpose, might take place. Again, even where enactments prohibiting transfers have had wider objects, such transfers have been held binding upon the actual individuals making the transfer, on the principle of a personal estoppel by reason of a personal interest possessed by those individuals. But where the prohibition has some object of public policy in view, the rule is to enforce the pro-

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hibition literally and strictly (compare *Hardcastle on Interpretation of Statutes*, 3rd Edition, pages 392 and 397).

There can be no doubt that S. 5 referred to, has been framed on considerations of such a policy and in order to guard against the dissociation from the specified offices, to any extent whatever, of the emoluments attached thereto, as that cannot but impair the efficiency of the services to be rendered by the officers and consequently affect injuriously the interests alike of the Government and of the sections of the public concerned.

In these circumstances the prohibition, in question, must be taken to be absolute and to deprive Civil Courts of all jurisdiction to give a direction for sale of such inam property as that in question. And the decree, in so far as the direction for sale goes, was altogether *ultra vires* and incompetent to confer the right intended, (See *e. g.*, *Vasenji Haribhai v. Lallu Akhu*<sup>1</sup>) and Courts are bound, on the matter coming to their notice, to abstain from enforcing their direction.

As to the cases of *Sadashiv Lahit v. Jayanti Bai*,<sup>2</sup> and *Narayan Khandu Kulkarna v. Kalgauda Birdar Patel*,<sup>3</sup> cited for the appellant—the former of which was the case of a right to officiate at religious ceremonies in a certain village, and the latter a case of *Kulkarni vatan* land—both, apparently, fall under the second of the heads stated above, *i. e.*, cases of estoppel on the ground of personal interest of the individual transferors. The provisions of S. 5 of the *Bombay Hereditary Offices Act*, (Act III of 1864) bearing on the question of a vatandar's power to alienate vatan land, which was under consideration in the second of the above cases differ indeed essentially from the provisions of S. 5 of the Madras Act, for, they imply that a vatandar has unrestricted power of transfer of vatan lands, when the transferee is a vatandar of the same vatan and, in other cases, that he could transfer, with the sanction of the Government. And *Sargent, C. J.* and *Telang, J.*, naturally enough, doubted whether provisions of the qualified character of S. 5 of the Bombay Act should be construed as making an alienation to a person outside the family, void as between the grantor and the grantee. These cases are clearly distinguishable from the present. The appeal fails, and is dismissed with costs.

1. I. L. R., 9 B., p. 285 at p. 288.

3. I. L. R., 14 B., p. 404.

2. I. L. R., 8 B., p. 185.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH.)

Present :—Sir Charles Arnold White, *Chief Justice*, Mr. Justice Subrahmanya Aiyar and Mr. Justice Davies.

Mahadeva Row Subban Rao Mohite... *Petitioner in all (Appellant in C. M. A. No. 124 to 126 of 1904.*

v.

Sethuram Sahib, and others ... *Respondents in all.*

C. P. C., Ss. 582, 587, 590,—“*Procedure*”—“*Powers*”—*Distinction between—Interim injunction—Jurisdiction of appellate Court to grant in appeal against order.*

Mahadeva  
Row  
v.  
Sethuram  
Sahib.

*Per Chief Justice and Subrahmanya Aiyar, J. (Davies, J., diss.)*:—An appellate Court has jurisdiction under the Code to pass an *interim* order of injunction pending an appeal against the order of the Lower Court refusing to grant a temporary injunction pending disposal of a suit for recovery of properties. The fact of the appeal not being against a decree does not prevent the Appellate Court from exercising jurisdiction in the matter.

*Per Chief Justice*:—It would be anomalous to hold that the High Court in second appeal possesses powers which it does not possess in an appeal from an original order and the want of uniformity in the language of Ss. 590 and 587, C. P. C., is no good reason for so holding.

*Semle*:—Even apart from the provisions of the Code, an Appellate Court has inherent jurisdiction to grant such an *interim* injunction.

*Per Davies, J.*:—The term “*procedure*” in S. 590, C. P. C., is not intended to cover all the provisions of ch. XLI of the Code and the term “*powers*” in S. 582 is pre-eminently not a point of “*procedure*” as used in S. 590.

Applications praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to pass an order restraining the respondents 1 and 2 herein by an injunction from obtaining the properties comprised in Schedule E to the plaint from the receiver pending the disposal of C. M. A. Nos. 124 to 126 of 1904 on its file.

*P. S. Sivaswami Aiyar* for petitioner.

*Sir V. Bhashyam Aiyangar* and *V. Krishnaswami Aiyar* for respondents.

The Court made the following

ORDER:—*The Chief Justice.*—This is a petition against an order of the Subordinate Judge dismissing an application for a



Mahadeva  
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—  
Chief Justice.

temporary injunction made by the plaintiff in a suit for the recovery of property, immoveable and moveable, including valuable jewels. In the Court below the Subordinate Judge granted an *interim* injunction and directed notice to issue to the defendants. After hearing the defendants he dismissed the application, but made an order purporting to continue the *interim* injunction pending the appeal to this Court. The plaintiff has appealed against the order of the Subordinate Judge dismissing the application for a temporary injunction and his appeal has been admitted and notice of his application for an *interim* injunction pending the hearing of the appeal has been directed to issue to the defendants. The question which has been raised is, has this Court jurisdiction pending the return of the notice to make an *interim* order. It seems to me that it has. It is quite clear that it was competent for the Subordinate Judge to make the order which he in fact made, viz., an *interim* order pending the return of the notice to the defendants. This power is expressly recognised by Section 494 of the Civil Procedure Code. It is also quite clear that an appeal lies from an order refusing to grant a temporary injunction after notice. See Section 588 (24). No appeal lies from an order refusing to grant a temporary injunction before notice (see *Lins v. Lins*)<sup>1</sup>. But the case before us is not an appeal from an order refusing to grant an *interim* injunction before notice. As a matter of fact the Subordinate Judge made an order granting an *interim* injunction before notice, but an appeal against an order refusing to grant a temporary injunction after notice, in which case a right of appeal is given in express terms by Section 588 (24). It has been argued that inasmuch as this is not an appeal against a decree, but an appeal against an order, this Court has no jurisdiction to make the *interim* order asked for pending the return of the notice. It seems to me that the fact of this not being an appeal against a decree does not prevent this Court having jurisdiction in the matter. Section 590, Civil Procedure Code, provides that the procedure prescribed in Chapter XLI shall, so far as may be, apply to appeals from orders, and Section 582, which occurs in Chapter XLI, gives to the Appellate Court the same powers as are conferred on Courts of original jurisdiction. No doubt Section 590 speaks of the procedure prescribed in Chapter XLI, whilst Section 587, with reference to second appeals enacts

1. I. L. R., 12 Mad. 186.

that the provisions contained in Chapter XLI shall apply to second appeals. But it appears to me that it would be anomalous to hold that this Court in a second appeal against a decree possesses powers which it does not possess in an appeal from an original order and the want of uniformity in the language of the two sections seems to me to be no good reason for so holding. Section 647 which occurs in the chapter relating to miscellaneous proceedings, provides that the procedure therein prescribed should be followed in all proceedings in any Court of Civil jurisdiction other than suits and appeals, and this section has been construed as enabling the Appellate Court in an appeal from an order to exercise powers which are something more than "procedure" in the limited sense. It has been held by the Privy Council that by virtue of the enactment corresponding to Section 647 of the present Code a District Court possesses the power of review, see *Reasut Hossein v. Hadjee Abdoolah*<sup>1</sup>. Again a reference to Section 19, clause 3 of the Succession Certificate Act, shows that in that enactment the Legislature proceeded on the assumption that S. 647 where the word "procedure" occurs confers the power to grant a review. In England an application for an *interim* injunction, even when the action itself was for an injunction has been held to come within the words "practice and procedure" in Section 1 (4) of the Judicature Act, 1894, *Mcharg v. Universal Stock Exchange*<sup>2</sup>.

Mahadeva  
Row  
v.  
Sethuram  
Sahib.  
—  
Chief Justice.

I should be loath to hold that this Court as an appellate tribunal does not possess jurisdiction to make an order which admittedly the lower Court had jurisdiction to make. In my opinion there is no provision of the Civil Procedure Code or reported case which constrains me so to hold. As at present advised I should be inclined to hold that the power to make the order asked for exists apart from any express provision of the Code as part of the inherent jurisdiction of the appellate tribunal incidental to the exercise of the appellate jurisdiction, but as, in my opinion, the jurisdiction is given by the Code itself this question need not be considered. I think we have jurisdiction to make the order asked for, if in the exercise of our discretion we should think fit to do so.

On the facts I am of opinion that this is not a case in which the jurisdiction should be exercised. No order for an *interim* injunction will be made.

1. I. L. R., 2 C. 131.

2. [1895] 2 Q. B. 81.

Mahadeva  
Row

v.  
Sethuram  
Sahib.

Davies, J.

*Subrahmanya Aiyer, J.*—I agree.

*Davies, J.*—I agree to the order which the learned Chief Justice has made, not only on the merits but because I think we have no jurisdiction to pass any other. I do not think the term “procedure” as used in Section 590, Civil Procedure Code, was intended to cover all the provisions of Chapter XLI, which deals with appeals from decrees, and it seems to me that S. 582 in that chapter conferring on appellate Courts under that chapter the same powers as Courts of original jurisdiction is pre-eminently not a point of “procedure” as the term is used in S. 590. When as in second appeals the Legislature intended that Chapter XLI should be applied bodily the words used are the “provisions contained in Chapter XL (*vide* Section 587) which are quite unambiguous and the same language might have been employed again in the closely succeeding Section 590, if as in second appeals Chapter XLI was intended to be applied bodily instead of the words “the prescribed Chapter XLI shall, as far as may be, apply”.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Chief Justice*,  
and Mr. Justice Subrahmanya Aiyer.

Sandu Sakul Mithu Tharaganar and another. \* Appellants  
v. (Plaintiffs).  
Hussain Sahib and others ... Respondents  
(Defendants).

Mithu Hussain Sahib. *Civil Procedure Code, S. 244—Decree-holder purchaser—Purchaser from a decree-holder—“Representative”—Maintainability of suit for possession.*

A purchaser from a decree-holder who has purchased property of the judgment-debtor at court auction is a representative of the “decree-holder” for the purposes of S. 244, C. P. C.

Proceedings for delivery of possession between a decree-holder purchaser and the judgment-debtor are proceedings “relating to the execution, discharge or satisfaction of the decree.”

A suit against a judgment-debtor by the purchaser from a decree-holder for delivery of possession of land purchased by the latter in Court auction and sold to the purchaser is barred by S. 244, C. P. C. Mithu  
V.  
Hussain Sahib.

Second appeal from the decree of the District Court of Tinnevely in A. S. No. 82 of 1902, presented against the decree of the Court of the Additional District Munsif of Tinnevely in O. S. No. 225 of 1901.

*P. R. Sundara Aiyar* for appellants.

*V. Krishnaswami Aiyar* for respondents.

The Court delivered the following

**JUDGMENT:—***The Chief Justice:—*In this case the decree holder in a suit purchased certain lands at Court auction. An application made by him under S. 318 of the Code of Civil Procedure for delivery of possession was dismissed. After his death further applications were made by his heirs. These applications were also dismissed. The heirs sold the lands to the plaintiffs and the plaintiffs now sue the judgment-debtors for recovery of possession. The point is—is the suit barred by S. 244, Civil Procedure Code? This involves two questions: (1) Is the right of the plaintiffs to recover possession of the lands, a question relating to the execution, discharge or satisfaction of the decree? (2) If it is, does the question arise between the parties to the suit in which the decree was passed, or their representatives?

As regards the first question, if the matter were *res-integra*, I should be disposed to hold that the question is not one "relating to the execution, discharge or satisfaction of the decree." It has been held, however, in a series of cases decided by this Court, that proceedings between a decree-holder who has purchased at Court auction and the judgment-debtor are proceedings "relating to the execution, discharge, or satisfaction of the decree." See *Viraraghava v. Venkata*<sup>1</sup>, *Vallathan v. Panguni*<sup>2</sup>, *Mutha v. Appasami*<sup>3</sup>, *Lakshmanan Chettiar v. Kannammal*<sup>4</sup>, *Kasinatha Aiyar v. Uthamansa Rowthan*<sup>5</sup>, and *Kattayat Pathumma v. Ramana Menon*<sup>6</sup>. The same view was taken by the Calcutta High Court in *Madhusudan Dass*

1. I. L. R., 8 M., p. 217.

2. I. L. R., 12 M. 454.

3. I. L. R., 13 M., 604.

4. I. L. R., 24 M. p. 185.

5. I. L. R., 25 M. 529.

6. I. L. R., 26 M. 740.

Mithu v. Gobinda Priz Chowdharani'. Although the decisions on the point are not altogether uniform, the balance of authority certainly supports the view taken by the Lower Appellate Court in this case.

Hussain Sahib,  
Chief Justice.

On principle I do not think any distinction can be drawn between a case where the proceedings are between the decree-holder who has purchased at Court auction and the judgment-debtor, and a case where, as here, the proceedings are between a party who derives title from a decree-holder who has purchased and a judgment-debtor. The argument on behalf of the appellants was that S. 318 only provides for the making of an order in favour of the certified purchaser, and that there is no provision of law whereby a party who derives title from a decree-holder who has purchased, can obtain delivery of possession from the judgment-debtor by execution proceedings in the suit in which the decree was obtained. This may be so, but it does not follow that proceedings between the party who derives title from the decree-holder who has purchased and the judgment-debtor are not proceedings relating to the execution, discharge or satisfaction of the decree. It is open to the party who proposes to take a conveyance from the decree-holder who has purchased to stipulate that the latter shall take the necessary steps to obtain delivery of possession under S. 318.

The second question is—the purchaser from a decree-holder who has purchased at Court auction a “representative” of the decree-holder for the purposes of S. 244?

As to this the authorities appear to be all one way. In *Dwar Buksh Sirkar v. Fatik Jak*<sup>1</sup>, it was held that the word “representative” included a purchaser of the decree from the decree-holder. In *Ishan Chunder Sirkar v. Beni Madhub Sirkar*<sup>2</sup> it was held that it included a purchaser of the interest of the judgment-debtor. In the case of *Kasinatha Aiyar v. Uthamansa Rowthan*.<sup>3</sup> Moore, J., expressed the view from which *Bhashyam Aiyangar, J.*, did not dissent, that a party who purchases from the decree-holder the lands which are the subject-matter of the decree is a “representative” for the purposes of the section. I see

1. I. L. R., 27 C., p. 34.  
3. I. L. R., 24 Cal., p. 62.

2. I. L. R., 26 Cal., p. 250.  
4. I. L. R., 25 M., p. 529.

no reason to take a different view from that adopted in the cases above referred to.

Minthu  
v.  
Hussain Sahib.

I think the District Judge was right. The second appeal is dismissed with costs.

SUBRAHMANIA AIYAR, J. :—It is now too late to contend that the question with respect to the delivery under S. 318 of the Civil Procedure Code of property purchased in a Court sale by the decree-holder, is not one relating to the execution of the decree. And as with reference to S. 244 of the Civil Procedure Code, the purchaser of the property from the decree-holder is the representative of the decree-holder within the meaning of that section, it follows that the bar to a separate suit laid down by that section applies to a question such as that raised in the present suit between the judgment-debtor and the purchaser from the decree-holder. I agree therefore that the appeal fails and should be dismissed with costs.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Chief Justice*,  
and Mr. Justice Subrahmaniya Aiyar.

Jagannatha Pandiajiair	...	...	Appellant *
v.			(Plaintiff).
T. S. Muthia Pillai and others	...	...	Respondents
			(Defendants 1 to 33).

*Landlord and tenant—Non-payment of rent, effect of—Limitation Act, Art. 131—Suit to establish right to recover rent—Period of limitation—Temple inam.*

Jagannatha  
Pandiajiair  
v.

Mere non-payment of rent will not bar the landlord's right to recover rent.

Muthia Pillai.

Such non-payment may be relevant when the question is whether the land for which rent is claimed belongs to the person who claims to recover the rent.

A suit to establish a person's right to recover rent is governed by Art. 131 of the Limitation Act.

Where a tree-tax was assigned as inam to a temple, the inam will cease where the trees became extinct.

But where the tax on land upon which trees stood and which was in possession of tenants was assigned as inam to a temple, the latter is entitled to the melwaram upon the land.

Jagannatha  
Pandiajiar  
v.  
Muthia Pillai.

Second appeal from the decree of the District Court of Tinnevely in A. S. No. 292 of 1901, presented against the decree of the Court of the Additional District Munsif of Tinnevely in O. S. No. 129 of 1900.

*V. Krishnaswami Aiyar* for appellant.

*M. R. Ramakrishna Aiyar* for respondent.

The Court delivered the following

**JUDGMENT :—**The plaintiff as the Manager of a Kattalai or service foundation connected with Nelliappa Swami temple in the town of Tinnevely, sues the committee of a college there for a declaration that the kattalai is entitled to payment of annual rent at Rs. 8-14-0 in respect of 88 cents of land which is in the possession of the committee and on a portion of which they have erected buildings appertaining to the college, as well as for the recovery of 3 years' arrears. The kattalai is admittedly entitled to an inam in the locality mentioned in the plaint, the income thereof being liable to be devoted to the upkeep of the services in the temple. In the extract from the Inam Register embodying the results of the enquiry by the Inam Commissioner in 1865, as well as in the title-deed granted in pursuance of that enquiry, the Inam is described as one of land, 2 acres and 23 cents in extent. The actual occupation of the said land has been with tenants, and it is to the melwarain right alone that the kattalai claims to be entitled. That the 88 cents in respect of which the claim for rent is made is part of the 2 acres and 23 cents is beyond dispute. Nevertheless the plaintiff's claim was dismissed by both the Lower Courts. One and perhaps the chief ground taken by the District Munsif was that though the 88 cents were purchased by the committee from the tenant who had been paying rent to the Kattalai, yet the land having been held by the committee since its purchase about the year 1863 up to the date of the suit without payment of rent, the plaintiff's claim was unsustainable. Non-payment of rent for a long period would be material evidence against the plaintiff had there been any dispute as to whether the 88 cents formed part of the 2 acres and 23 cents described in the documents already referred to. That not being the case, the circum-

stance in question cannot by itself be an answer to the plaintiff's claim, if that be not barred by limitation and is otherwise sustainable. The article of the Limitation Act applicable is Art. 131, but there was no averment or proof on behalf of the defendants that any demand for rent had been made and refused 12 years prior to the date of the suit.

Jagannatha  
Pandisaiar  
v.  
Muthia Pillai.

The other ground taken by the District Munsif, which is what forms the sole basis of the District Judge's conclusion on appeal, has reference to certain trees which formed a *tope* or grove on the land in question up to about the year 1871 or so. Both the District Munsif and the District Judge hold that the '*tope*' constituted the Inam—a form of expression conveying no very precise meaning—the foundation for which is the use of the phrase '*tope inam*' in the Inam Register as well as in the title-deed. In thus making that expression, the sole criterion as to what the Inam consisted of, the lower Courts practically ignore entries in the Inam Register which throw real light on the nature of the inam. Those in columns 3, 4 and 5 expressly treat as Inam the whole of the 2 acres and 23 cents, on portions only of which the trees stood and so much thereof as was used for rice cultivation is shown in column 12 as Inam subject to payment of one-quarter assessment to Government, the remaining three-fourths of the assessment being due to the Inamdar. The explanation for the inam being referred to as '*tope*' inam, most probably is that when the inam was originally granted the land was entirely covered by trees and did not admit of other cultivation, and therefore was spoken of as '*tope*' as contradistinguished from '*wet*' or '*dry*,' with reference to the cultivation usually followed in the matter. Or perhaps it may be that the system of assessment followed in the case of this Inam included, according to the practice which had prevailed prior to the year 1858 in Government villages, the imposition of an assessment on fruit-bearing trees as well. That the Inam consisted not only of such tree-tax, (if the latter be the real explanation) but also of tax on land on which no trees were growing and on which other cultivation was carried on, is clear from the imposition of the one-quarter wet assessment already referred to. Now if by the statement that the Inam consisted of *tope* only was meant that the right to the tree-tax alone was assigned as Inam, it would follow



Jagannatha  
Pandiajiar  
v.  
Muthia Pillai.

that where the trees ceased to exist the Inam became extinct. In this view as admittedly the trees were cut down with the consent of the Inamdar about the year 1871, the consequence would be that the Government would thereafter have been entitled to treat the 2 acres and odd as altogether free from any claim on the part of the kattalai and was having become ryotwary land subject to payment of land revenue. But of course that view has not been taken or suggested by any of the parties concerned, including the Government who have continued to acknowledge the 2 acres and 23 cents as the permanent Inam of the kattalai subject to the payment of Rs. 2-8-0, the quit-rent fixed by the Inam Commission when the Inam was confirmed and the Sannad granted.

If follows, therefore, that the defendants as parties in possession of part of what was assigned as Inam to the kattalai, are liable to pay the proportionate rent. No serious question having been raised in the Courts below as to the amount thereof we must reverse the decree of the lower Courts and grant the declaration prayed for and also award the arrears claimed with interest at six per cent from the date of plaint up to date of payment with costs throughout.

#### IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmaniam Aiyar and Mr. Justice Boddam.

Ramaswamy Pantulu and another ... Appellants\* (*Plaintiffs*).

v.

Narayanamoorthy Pantulu and another... Respondents (*Defendants*).

Ramaswamy  
Pantulu  
v.  
Narayana-  
moorthy  
Pantulu.

*Provincial Small Cause Courts Act, Arts. 38, 41—Decree for maintenance against four brothers—Payment by a representative of one—Claim for contribution—Cognizable by Small Cause Court.*

A claim for contribution in respect of sums paid by the representatives of a judgment-debtor to satisfy a decree passed against the latter and his three brothers for maintenance which, however, was not made a charge on property, is one cognizable by the Court of Small Causes and does not fall under Art. 38 or Art. 41 (first part) of the Provincial Court of Small Causes and, therefore, no second appeal lies under S. 586, C. P. C.

The anterior liability which led to the decree for maintenance being passed does not affect the question.

Second appeal from the decree of the District Court of Ganjam at Berhampore in A. S. No. 103 of 1902, presented against the

decree of the Court of the District Munsif of Berhampore in O. S. No. 30 of 1901.

Ramaswamy  
Pantulu  
v.  
Narayana-  
moorthy  
Pantulu.

*T. Rangachariar* for appellants.

The Court delivered the following

**JUDGMENT :—**In O. S. No. 157 of 1864 in the District Munsif's Court at Berhampore, the widow of one of five brothers who were Hindus, brought a suit against her husband's surviving brothers, four in number, for her maintenance and got a decree making them laible to pay the same to her periodically. The maintenance, however, was not made a charge on any property. Venkatasubba Rao was the judgment-debtor who survived last, and the decree-holder took out execution against him after the death of the other judgment-debtors and recovered Rs. 197 and odd. The plaintiffs, who are the sons of Venkatasubba Rao, sue the defendants who are the sons of one of the judgment-debtors that predeceased Venkatasubba Rao for a fourth of the amount paid by the plaintiffs in execution of the decree as aforesaid. The lower appellate Court dismissed the plaintiffs' suit.

It is contended for the defendants that no second appeal lies in the case, and this objection is clearly well founded as the suit is one which does not fall under any of the articles in Schedule II to the Provincial Small Courts Act (Act II X of 1887). Neither Art. 38 nor the first part of Art. 41 to which reference was made on behalf of the plaintiffs, has obviously any bearing on the case. The claim here is not one 'relating to maintenance with reference to the former article, nor in respect of a payment made by a sharer in joint property of money due from a co-sharer' within the meaning of the latter. It is not the fact that the brothers were liable to the decree-holder for maintenance, nor is there any circumstance connected with the position of the brothers in the family or their right in respect of its property, that is the real basis of the present claim for contribution, but the liability cast upon them by the decree passed against them jointly. The anterior liability which led to such a decree being passed is immaterial so far as the present question is concerned.

The second appeal is, therefore, dismissed with costs.

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Chief Justice*,  
and Mr. Justice Subrahmanya Aiyar.

M. Subraya Chetty ... .. *Appellant.\**  
v.  
A. S. Rajammal ... .. *Respondent.*

Subraya  
Chetty  
v.  
Rajammal.

*Contract Act, S. 130—Surety to an administration bond—Right to be discharged from future liability—Right to sue for administration.*

A person who stands as surety to an administration under S. 78 of the Probate and Administration Act is not entitled to be discharged from his liability as regards future transactions upon the ground that the administratrix is wasting and mismanaging the estate.

The English practice is also that the original sureties to an administration bond will not be discharged and other sureties allowed to be substituted in their place by the Court.

S. 130 of the Contract Act does not apply to the special contract of suretyship entered into by a surety to an administration bond.

A surety to an administration bond is neither a creditor of the estate nor a legatee and is not entitled to bring an administration suit.

On appeal from the judgment of the Hon. Mr. Justice Moore in the Ordinary Original Civil Jurisdiction of this Court in C. S. No. 19 of 1903.

*D. Chamier and A. E. Rencontre* for appellant.

*P. R. Sundara Aiyar and T. Tangavelu Chettiar* for respondent.

The Court delivered the following

**JUDGMENT :—**In this case the 1st defendant who is the administratrix of her husband's estate gave the bond required by S. 78 of the Probate and Administration Act, and the plaintiff became one of her sureties. The plaintiff brought a suit in which he alleged that the 1st defendant was wasting and mismanaging the estate, and he asked that he might be discharged from his recognizances as a surety as regards future transactions on the part of the first defendant or alternatively that the first defendant might be directed to discharge certain specified claims against the estate and complete the administration. The learned Judge dismissed the suit and the plaintiff appeals.

As regards the plaintiff's first claim for relief that he may be discharged from future liability under his surety bond, we think

the learned Judge was right in refusing to make the order asked for. In Williams on Executors, 1893, Vol. 1, p. 462, it is laid down that the Court will not discharge the original sureties to an administration bond and allow other sureties to be substituted for them, and a similar statement of the law and practice is to be found in Dixon on Probate, p. 271 and Tristram and Coote's Probate Practice, 11th Edition, p. 105. The authority cited is *Re Stark*<sup>1</sup>. The later case of *Re Ross*<sup>2</sup>, where an administrator having gone abroad, and under an order in chancery, assets had accrued to the estate during his absence, a substitute was allowed to execute the fresh bond which was necessarily limited to the administrator's execution of a similar bond on his return is in no way inconsistent with the rule of practice which was recognised in *Re Stark*<sup>1</sup>.

Subbraya  
Chetty  
v.  
Rajammal.

Mr. Chamier on behalf of the plaintiff sought to distinguish the case of *Re Stark*<sup>1</sup> upon the ground that the basis of the decision in that case was that the substituted sureties could not be made responsible for past transactions and that the plaintiff in the present case only asked to be released from responsibility as regards future transactions. But the case of *Re Stark*<sup>1</sup> appears to have been accepted by practitioners as recognising the rule that the original sureties cannot be discharged either as regards past or future liability.

No precedent is to be found for the order which we are asked to make and on principle, we do not think that any such order ought to be made. The making of such an order might defeat the object for which an administrator is required to find sureties to his administration bond. We are unable to agree with the decision in the case of *Raj Narain Mookerjee v. Full Kumari Debi*<sup>3</sup>. The attention of the learned Judges of the Calcutta High Court does not appear to have been drawn to the case of *Re Stark*. If, as we should be prepared to hold, the surety to an administration bond is not entitled to an order discharging him from future liability on an application in the probate proceedings to the judge or officer who is the obligee under the bond of suretyship, it seems to follow *a fortiori* that he is not entitled to this relief where he claims it as here in a separate suit.

We are of opinion that S. 130 of the Contract Act which provides that a continuing guarantee may at any time be revoked by the surety, as to future transactions by notice to the creditor, does

1. L. R. 1 P. & D. 76.

2. L. R. 2 P. & D. 274.

3. I. L. R., 29 C. 68.

Subbaya  
Chetty  
v.  
Rajammal.

not apply to the special contract of suretyship which is entered into by a surety to an administration bond. If the section applies, the "creditor" would presumably be the obligee under the bond, i.e., the Judge or Registrar, and the surety could without action or any other legal proceeding, put an end to his liability by giving notice to the Judge or Registrar. This is contrary to the well established practice and might lead to great inconvenience. S. 130 embodies the English rule of law and the proceedings in the case of *Re Stark*<sup>1</sup> show that, so far as the English practice is concerned, it has never been suggested that the general rule of law as to continuing guarantees applies in the case of a suretyship to an administration bond. In the Calcutta case the Chief Justice guards himself by saying that he was not dealing with the case of a person who becomes surety and then from mere caprice or for no sound reason desires to be discharged; but under S. 130 the surety has an absolute right at any time to revoke his guarantee as to future transactions, and if that section is applicable it seems to us that it would not be open to the Court to inquire into the grounds upon which the surety had given notice of revocation. In *Calvert v. Gordon*<sup>2</sup> it was held that upon a bond conditioned for a clerk accounting for and paying over money received by him the obligor could not discharge himself from further liability by notice. In *Lloyds v. Harper*<sup>3</sup> it was held that a guarantee given to the Committee of Lloyds could not have been withdrawn during the lifetime of the guarantor and was not determined by his death. In the case of *Bai Somi v. Chokshi Ishvardas and Manqaldas* where a surety for the guardian of a minor's estate applied to be released from his obligation on the ground of the guardian's maladministration, the Court held that the surety could not be discharged and that S. 130 of the Contract Act was not applicable.

We entirely agree with this decision and with the reasoning upon which it was based.

As regards the plaintiff's alternative claim to relief, as he is neither a creditor nor a legatee and is therefore not entitled to bring an administration suit, it is clear that it is not open to him to obtain an order against the administration refusing her to administer the estate.

We think the decision of *Moore, J.* was right, and we dismiss this appeal with costs.

1. L. R. 1 P. & D. 76  
2. 7 B. & C. 809.

3. L. R. 16, Ch. D. 390.  
4. I. L. R., 19 B. 245.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Boddam and Mr. Justice Sankaran Nair.

Gurusami Aiyar	...	...	...	Appellant*
v.				(2nd Defendant).
Kaveri Boyee Ammal	...	...	..	Respondent
				(Plaintiff).

*Res-judicata*—C. P. C., S. 13, Expl. II—Judgment setting aside auction sale to mortgagee as fraudulent—Suit by mortgagee on hypothecation, maintainability of—  
Merger of mortgage.

Gurusami

Aiyar

v.

Kaveri

BoyeeAmmal.

Where a mortgagee purchases the equity of redemption and the sale is set aside as fraudulent there is no merger of the mortgage and the mortgagee is entitled to fall back upon his mortgage.

A judgment in a suit for setting aside an auction sale to the mortgagee as fraudulent and for recovery of possession from the mortgagee purchaser will not bar the latter from suing to recover the amount due under his hypothecation (which does not entitle the mortgagee to hold possession).

The matter relating to the hypothecation is not a matter which might or ought to have been made a ground of attack within the meaning of S. 13, Expl. II, C. P. C.

Second appeal from the decree of the Subordinate Judge's Court of Negapatam in A. S. No. 18 of 1901, presented against the decree of the Court of the District Munsif of Tanjore in O. S. No. 428 of 1899.

*T. V. Seshagiri Aiyar* for appellant.

*P. S. Sivaswami Aiyar* for respondent.

The Court delivered the following

**JUDGMENT:**—This is a suit to recover the amount due under a deed of hypothecation, dated the 6th September 1884, and for sale of the property hypothecated. Both the Courts below have given decrees for the plaintiff; but in this Court it is contended that the suit should have been dismissed because the matter is (1) *Res-judicata* within Explanation II of S. 13 of the Civil Procedure Code, and (2) because the plaint mortgage has ceased to exist as such having become merged as the plaintiff had become owner as well as mortgagee of the property hypothecated prior to the suit.

The facts are as follows :—On the 6th September 1884, the hypothecation bond now sued on was executed to Ranganatha Butt by Ranganatha Davay and his three sons, Balakrishna, Rama-

\* S. A. No. 1585 of 1902.

15th September 1904.

Gurusami  
Aiyar  
v.  
Kaveri  
Boye Ammal.

chandra and Venkatesa. Afterwards Ranganatha Davay and two of his sons, Balakrishna and Ramachandra, executed a simple debt bond to one Appasawmy Josier. Appasawmy died and his widows (of whom the present 1st defendant is one) brought Small Cause Suit No. 775 of 1886 against Ranganatha Davay and his three sons, Balakrishna, Ramachandra and Venkatesa under the bond and got a decree against Ranganatha Davay and his two sons Balakrishna and Ramachandra only, the third son Venkatesa being exonerated from liability. In execution of that decree the plaint property was attached, but on the objection of the 3rd son Venkatesa Ranganatha Davay, the father having died, his one-third share was exonerated with costs, and only the two-thirds belonging to Balakrishna and Ramachandra was brought to sale. This was purchased in March 1890 by the 1st defendant, who obtained a sale certificate. Venkatesa, the 3rd son, in execution of his decree for costs against the defendant attached this two-thirds and brought it to sale, and it was bought in March 1890 for Rs. 14 by his brother-in-law Bavani Sankar Davay, to whom in June 1891 the plaint mortgage had been transferred by Exhibit A, endorsed on Exhibit A, the hypothecation deed now sued on.

The plaintiff in this suit is the wife of Balakrishna.

On the 17th June 1891 by Exhibit G, Bavani Sankar Davay assigned to the plaintiff the present hypothecation right now sued on and also the two-thirds of the premises purchased by him in the auction sale on the execution by Venkatesa against the 1st defendant for costs, and on the same date by Exhibit A Venkatesa sold his one-third share in the plaint premises also to the plaintiff—who thus apparently became assignee of the plaint hypotheca and owner of the whole of the plaint properties.

In 1894, however, the present 1st defendant, in O. S. No. 664 of 1894, sued Balakrishna, Ramachandra and Venkatesa, Bavani Sankara Davay, and the plaintiff to set aside the auction sale of the two-thirds of the plaint property to Bavani Sankar Davay in execution for costs of Venkatesa and for possession on the ground that the sale was fraudulent, and got a decree for possession.

It is contended that inasmuch as in that suit the present plaintiff did not set up the hypothecation now sued on, she cannot

sustain the present action as it could and ought to have been set up as a ground of defence in that action and therefore that the matter is *res-judicata* within Explanation II of S. 13 of the Civil Procedure Code in this suit, and also that inasmuch as she was owner of the whole premises under Exhibits G and H, the hypothecation became merged and was not kept alive under section 101 of the Transfer of Property Act.

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Kaveri  
BoyceAmmal.

We are of opinion that neither of these contentions can be supported.

To deal with the last first, there was no merger because in law the plaintiff never became the owner of the whole premises, for that is the effect of the decree obtained by the 1st defendant in O. S. No. 664 of 1894, whereby it was held that the sale of the two-thirds was fraudulent and void and therefore never became the property of the plaintiff.

As regards the contention that the matter is *res-judicata* we think the appellant must also fail. The suit was to set aside an auction sale as fraudulent and void and for possession on the ground that the property and the right to possession remained in the 1st defendant. We think that the present hypothecation was not a matter which might or ought to have been made a ground of defence or attack in such a suit, as it was wholly immaterial in answer to such an action and could not alter the result which was to set aside the auction sale and to revest the property in the 1st defendant. If it had been set up it could be no answer even to the claim for possession for the right to possession would nevertheless be in the 1st defendant who would be entitled to hold the possession until the mortgagee wished to recover the money advanced under the hypothecation-deed, and she could not be compelled to demand its repayment at that particular time merely because the mortgagor claimed that she and not the mortgagee was entitled to possession by reason of the fact that the document under which the mortgagee purported to have obtained possession irrespective of the hypothecation deed was fraudulent and void.

The other points raised were not pressed and do not need to be gone into.

We, therefore, dismiss this second appeal with costs.



## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subramania Aiyar and Mr. Justice Boddam.

Krishnier	...	...	...	...	Appellant*
	v.				(Plaintiff).
Arappuli Iyer and others		...	...	...	Respondents
					(Defendants).

**Krishnier**      *Covenant by mortgagee to pay Government kist—Enhancement—Liability to pay*  
**v.**                      *enhanced kist—Right of suit before redemption.*  
**Arappuli**  
**Iyer.**

A usufructuary mortgagee in possession covenanting to pay the Government kist on the mortgaged land and to appropriate the balance of profits for interest on the mortgage amount irrespective of the actual profits in any particular year is not, in the absence of a contract to the contrary, liable as between himself and the mortgagor to pay enhanced revenue if the enhancement takes place subsequent to his mortgage. The reasonable view is that the revenue payable under the settlement in force is all that the mortgagee undertakes to pay and the ultimate responsibility in respect of any addition to the land revenue devolves on the mortgagor. *Kamaya v. Devapa*<sup>1</sup> and *Hira Lall v. Ganesh Pershad*<sup>2</sup> referred to.

*Quarre.*—Whether the mortgagor can maintain suit against the mortgagee for the amount of revenue payable by the latter and paid by the mortgagor without offering to redeem.

Second appeal from the decree of the District Court of Trichinopoly in A. S. No. 184 of 1901, presented against the decree of the Court of the District Munsif of Kulittalai in O. S. No. 183 of 1901.

*R. Kuppusami Aiyar* for appellant.

*S. Srinivasa Aiyar* for *V. Krishnaswami Aiyar* for respondent.

The Court delivered the following

**JUDGMENT :—**The defendant obtained a mortgage from the plaintiff in January 1891 and was put into possession of the mortgaged land. Under the mortgage instrument the mortgagee was to pay the Government revenue payable on the land mortgaged and to take the profits in lieu of interest without reference to whether the

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\* S. A. No. 1317 of 1902.

19th September 1904.

1. I. L. R. 22 B. 440.

2. L. R. 9 I. A. at pp. 68 & 69.

profits were more or less in particular years. The mortgage money was payable on the 11th May 1893. In 1895 the Government revenue on the land mortgaged was enhanced from Rs. 5 to Rs. 41, and this the mortgagee paid for three years and then declined to pay more than Rs. 20 and the mortgagor paid the balance and brought this suit in 1901 for the amount so paid by him.

Krishnier  
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Arappuli  
Iyer.

It may be a question whether in the absence of a specific contract to that effect a mortgagor in the position of the plaintiff could claim the amount except in a suit to redeem. As, however, no such objection was taken in this case in the courts below, and as the decree in the Court of First Instance against the defendants for what should have been paid by him, with reference to the amount of revenue as it stood prior to the enhancement, has been accepted by him without any appeal being preferred against it, we think that the question of construction raised in the lower courts and dealt with by them should be decided; and we agree with them in holding that, according to the proper construction of the instrument the mortgagee was not under obligation to pay the increased portion of the assessment. Though both the parties should be taken to have been aware that Government revenue payable on the land mortgaged was liable to revision, there is nothing to show that the term of the mortgage as to the payment of the revenue by the mortgagee had reference to any other than the then existing settlement. Considering that the profits remaining after payment of the Government revenue were to go in lieu of interest on the money, the reasonable view is that the revenue payable under the settlement in force was all that the mortgagee undertook to pay, the ultimate responsibility in respect of any addition to the land revenue devolving on the mortgagor. See *Kamaya v. Devapa*<sup>1</sup> and *Hira Lall v. Ganesh Pershad*<sup>2</sup>.

The appeal, therefore, fails and is dismissed with costs.

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1. I. L. R., 22 B. 440.

2. L. R., 9 I. A. at pp. 68, 69.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Davies and Mr. Justice Sankaran Nair.

Lakshamma ...	..	...	...	Appellant*
v.				(Defendant.)
Krishniah ..	...	...	...	Respondent.
				(Plaintiff).

**Lakshamma** *Mortgagor and Mortgagee—Property mortgaged not belonging to the mortgagor—Decree upon mortgage—Decree-holder purchaser—No second decree for money—No right to recover property not mortgaged.*  
**v.**  
**Krishniah.**

A mortgagee, after obtaining a decree for money, is not entitled to another decree for money on the ground that the land mortgaged to him does not belong to his mortgagor.

Where a family consisting of two brothers owned two plots of land and in a partition, each got one plot and one of the brothers mortgaged the plot which fell to the share of the other and the mortgagee obtained a decree for sale of the property mortgaged and purchased it himself, the decree-holder purchaser will not be entitled to recover the plot actually belonging to his mortgagor.

Appeal from the order of the District Court of Nellore, in A. S. No. 153 of 1903, presented against the decree of the Court of the District Munsif of Ongole in O. S. No. 223 of 1902.

Survey Nos. 332, 333, belonged to a joint family consisting of Venkatapathi, husband of the defendant (appellant) and his cousins. A partition took place between Venkatapathi and his cousins and Survey No. 333 fell to the share of Venkatapathi while Survey No. 332 fell to the share of the latter's cousins. Venkatapathi mortgaged his land to the plaintiff describing it as Survey No. 332 instead of Survey No. 333. After his death the plaintiff brought a suit against his widow (the defendant) upon his mortgage in O. S. 527 of 1897 on the file of the District Munsif's Court, Ongole, and obtained a decree for sale of No. 332. In execution of such decree land No. 332 was sold and purchased by the plaintiff. In the proceedings for delivery, the cousins of Venkatapathi obstructed and it was ultimately held in the litigation connected with such obstruction that Survey No. 332 belonged to the obstructors and that Survey No. 333 belonged to the late Venkatapathi. The plaintiff again brought this suit against the widow either for recovery of possession of land No. 333 or in the alternative for recovery of money due under the mortgage bonds by sale of Survey No. 333. His ground of claim for the land was that the land

\* C. M. S. A. No. 113 of 1904.

30th September 1904.

really mortgaged was Survey No. 333 which was described by mistake as 332 and that the land really purchased by the plaintiff must be taken to be Survey No. 333. The District Munsif held that as the land in fact sold and purchased by the plaintiff was Survey No. 332, though the same might be due to a mistake, he would not be entitled to recover the right land without suing for a rectification of the mistake and that he was not entitled to recover the money again in the face of the decree in O. S. 527 of 1897. He, therefore, dismissed plaintiff's suit. Upon appeal, the District Judge held that the plaintiff was entitled to enforce his right by adding a prayer that the mistake might be rectified and to recover the purchase money and that the addition of a prayer for rectification would not alter the character of the suit. He, therefore, remanded the case to the District Munsif. Hence this second appeal.

*T. Subramania Aiyar* for *P. S. Sivaswami Aiyar* for appellant.

*T. V. Seshagiri Aiyar* for respondent.

The Court delivered the following

JUDGMENT:—We are clearly of opinion that the suit as brought will not lie neither as a suit for possession nor as a suit for the recovery of the money. The plaintiff is not entitled to possession, for the property was not mortgaged to him, and he is not entitled to another decree for the recovery of the money as he has already got one. We must, therefore, reverse the order of the District Judge remanding the suit for trial and restore that of the District Munsif dismissing the suit with the defendant's costs in this and in the District Court.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Subrahmania Aiyar.

Chendrasekhara Dalai and another ... Petitioners\*  
(Accused).

v.

Emperor.

*Criminal Procedure Code, S. 107—Order to keep Mokhasadar—Protest by Mokhasadar—Zamindar's interference with Mokhasadar's possession.*

Chendrasekhara Dalai  
v.  
Emperor.

A Zamindar acts illegally in sending people to a Mokhasa village to oust the Mokhasader from possession and to induce the tenants to break their engagements

\* CrI. B. C. No. 189 of 1904.

(CrI. B. P. No. 138 of 1904).

16th August 1904.

Chendrase-  
khara Dalai  
v.  
Emperor.

with the Mokhasader and the Mokhasadar is entitled to object to this trespass and to protest against such improper proceedings. Such protests on the part of the Mokhasadar or his agent will not justify a magistrate in binding him to keep the peace.

Petition under Ss. 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the proceedings of the District Magistrate of Vizagapatam, in the matter of Mis. Cases Nos. 17 and 18 of 1903 on the file of the Head Assistant Magistrate of Narasipatam Division.

The 1st accused is the Mokhasadar in possession of Arjapuram and other villages and the 2nd accused is his brother. The proprietors of Madgole Zemindary wanted to resume the Mokhasa and caused a proclamation to be made asking the tenants not to pay their rents to the 1st accused. The 1st accused published a counter proclamation threatening the ryots with summary suits if the rents are not paid. The officials of the Madgole proprietors went to take Kadapas from the ryots, and the 2nd accused thereupon insisted upon the officials, leaving the village and desisting from inciting the tenants to break their contracts with the first accused. Upon these facts the Head Assistant Magistrate directed the accused to execute bonds for security for keeping the peace. Upon appeal the District Magistrate confirmed this order. Hence this criminal revision petition.

*C. R. Tiruvenkatachariar and K. R. Krishnaswami Aiyangar* for petitioners.

The *Acting Public Prosecutor (John Adam)* on behalf of the Crown.

The Court made the following

ORDER:—The order of the Head Assistant Magistrate shows beyond doubt that, at the time referred to therein, the village was in the possession of the first accused as the grantee thereof from the Zemindars and that the ryots of the village had previously attorned to and been paying rents to him having executed muchilikas in his favour. In these circumstances when the agent of the Zemindar, attended by a body of men stated to be about twenty, came to the village for the express purpose of ousting him by inducing the tenants to break their engagements with him and to make them go over to the Zemindars and execute muchilikas and pay rents to them thereafter those agents were clearly acting illegally. The first defendant was certainly entitled to object to such trespasses being committed by them and to protest against their

improper proceedings so long as in doing so he committed nothing unlawful. Admittedly the first accused himself was not at the scene with reference to which the order for security to keep the peace has been passed against the first accused and his brother, the second accused. It was but the latter accompanied by one servant, that met the Zemindar's agent's party and insisted upon their leaving the village and desisting from inciting the tenants to break their contracts with the first accused. What the second accused appears from the evidence to have done on the occasion is that he spoke to the Zemindar's agent in an excited manner which, under the circumstances, was not altogether surprising. The utmost that the witnesses could say against him was that while speaking he twisted his moustaches, stamping the ground with the walking stick or umbrella he had with him. It seems to me that this could afford no ground for binding him to keep the peace and much less for binding the first accused, assuming even that the second accused's protests were made with the first accused's knowledge and at his instance as to which, however, there is no evidence.

Chendrasekhara Dalai  
v.  
Emperor.

Following the decisions in *Bejoy Singha Neogi and others v. Empress*,<sup>1</sup> and *Kali Prasanna Bhagari and two others v. Empress*<sup>2</sup> cited for the first and second accused, I set aside the order of the lower Courts and order the bonds taken from them to be cancelled.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subramania Aiyar and Mr. Justice Boddam.

Ramalinga Mudaly ... Appellant.\*

v.

Aiyadorai Nainar and another ... Respondents  
(Defendants 2 and 3).

*Registration of a document—Transfer of property—Consideration that transferee should give daughter in marriage.*

Ramalinga  
Mudaly  
v.  
Aiyadorai  
Nainar.

Mere registration of an instrument without reference to other circumstances does not operate to transfer property comprised in the instrument. *Ponnayya Goundan v. Muthu Goundan*<sup>3</sup> distinguished.

Where it is proved that the consideration for a document as expressed in it is

\* S. A. No. 1305 of 1902

21st September 1904.

1. 3 C. W. N. p. 463.

2. Ibid (Notes of cases) p. cccxix.

3. I. L. R., 17 M, 146.

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Mudaly  
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Aiyadorai  
Nainar.

not the real one and that the real consideration for the transfer of property is the gift by the transferee of his daughter in marriage to the transferor (and not the mere promise to give) and the transferee subsequently refuses to give his daughter in marriage, although the transferor registers the document evidencing the transfer of property while retaining possession of the document and the property, the transfer is conditional upon the event of the marriage taking place and no property would pass if the condition fails to take effect.

Second appeal from the decree of the District Court of South Arcot in A. S. No. 316 of 1901, presented against the decree of the District Munsiff's Court of Cuddalore in O. S. No. 538 of 1900.

*T. Rangachariar* for appellant.

*V. Krishnaswami Aiyar* and *S. Srinivasa Aiyar* for respondents.

The Court delivered the following

**JUDGMENT :—**Both the courts are agreed as to the important facts in the case. Though what purports to be a sale-deed for money was executed and registered by Sabapathy Pillai to the 1st defendant, yet the instrument was not delivered to him but retained by Sabapathy Pillai himself, who also remained in possession of the property until he made the transfer in favour of the temple represented by the plaintiffs and subsequently held possession under the temple as their tenant until his death. It was subsequently to his death, ten years after the supposed sale to him that the 1st defendant took possession of the property. The defendants' plea that the intended transfer to him was in consideration of Rs. 300 actually paid was untrue. The explanation on behalf of the plaintiffs of the transaction was that Sabapathy Pillai intended to marry the 1st defendant's daughter, and that the transfer was to be in consideration of such marriage which, in fact, never took place, and that the 1st defendant having refused to give his daughter in marriage the transfer was never completed. Notwithstanding the by no means clear language used by the Munsif in that part of his judgment to which our attention has been called on behalf of the 1st defendant, we cannot agree with the suggestion that the plaintiff's case was that the mere promise to give and not the actual gift of the girl, formed the consideration for the execution of the deed by Sabapathy Pillai. It would be absurd to suppose that Sabapathy Pillai was willing

to part with his property upon the mere promise to give the girl in marriage irrespective of whether that promise was to be carried out or not, and the unquestionable facts that the document was never delivered nor possession of the property given, are absolutely inconsistent with the suggestion referred to which has been accepted by the Judge. It is, therefore, clear that the transfer was intended to be effected only in the event of the marriage taking place, and as it did not take place, effect was not given to the intention to transfer and no property passed to the 1st defendant. *Ponnayya Goundan v. Muthu Goundan*<sup>1</sup> to which the District Judge refers, has no application to cases of this kind, and though in the circumstances of that case, actual handing over of the instrument after registration was not essential to vest the property in the vendee, it cannot be laid down as a general rule that mere registration of an instrument without reference to other circumstances operates to transfer the property. *Sangu Aiyar v. Cumarasami Mudaliar*<sup>2</sup> and *Maula Din v. Raghunadan Pershad Singh*<sup>3</sup>.

Ramalinga  
Mudaly  
v.  
Aiyadorai  
Nainar.

We, therefore, reverse the decree of the District Judge and restore that of the District Munsif with costs in this and in the lower appellate court.




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1. I. L. R., 17 M. 146.    2. I. L. R., 18 M. 61.    3. I. L. R., 27 C. 7.





## NOTES OF RECENT CASES.

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Officiating Chief Justice, }  
Boddam J. } S. A. No. 621 of 1902.  
1904, Feb. 3.

*Rent Recovery Act, Ss. 69, 76—Civil Procedure Code, S. 561—*

*Memo. of Objection—Inherent power of Appellate Court to deal with the whole case—Improper stipulation in a patta.*—

No memo. of objections will lie under S. 561, C. P. C. in appeals under the Rent Recovery Act.

There is no inherent power in any Court to deal with portions of the decree of the Lower Court not appealed against. 23 C. 992 P. C. followed.

A stipulation in a patta to the effect that the tenant shall be responsible for the loss of crops by reason of theft committed either by the tenant or his men is not a proper stipulation.

*J. Krishna Rao, V. Krishnaswami Aiyar and S. Srinivasa Aiyar* for appellant.

*P. R. Sundara Aiyar, V. Ramesam and K. Subrahmanya Sastri* for respondent.

Officiating Chief Justice, }  
Benson J. } A. No. 155 of 1900.  
Russell J. }  
1904, Feb. 16.

*Hindu Law—Stridhanam—Property purchased from widows' savings in maintenance allowance—Succession to such property.*

Immoveable property purchased by a Hindu widow out of funds paid to her by her husband's relations for her maintenance constitute her *stridhan* for purposes of succession.

Such property is not *stridhan* in the hands of her daughter, she having only a life-interest therein; and on the death of the daughter, succession is again to be traced from the full owner, the widow, and the property would devolve on her *stridhanam* heirs; they being the daughter's daughters in preference to the daughter's sons. 25 A 468 and *Ib.* 473 explained.

Sir *V. Bhashyam Aiyangar*, *C. Sankaran Nair* and *S. Srinivasa Aiyangar* for appellants.

*V. Krishnaswami Aiyar*, *P. R. Sundara Aiyar*, *K. Srinivasa Aiyangar* and *A. Nilakanta Aiyar* for respondents.

<i>Davies J.</i> <i>Boddam J.</i> 1904, Feb. 18.	}	<hr style="width: 10%; margin: 0 auto;"/> <i>S. A. No. 446 of 1902.</i>
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*C. P. C., S. 43—First suit on one mortgage—Dismissal on the ground that the specific mortgage was false—Subsequent suit alleging a different mortgage.*

Where a person brings a suit for redemption on a specific mortgage and on its being dismissed on the ground that the alleged mortgage was false, he subsequently brought another suit for redemption basing his claim on another mortgage.

*Held* that *S. 43* was a bar to the second suit. 22 M. 259 approved and followed.

[26 M. 760 quoted but not followed.—*Ed.*]

*K. P. Govinda Menon* for appellant.

*J. Krishna Rao* for respondents.

<i>Davies J.</i> <i>Boddam J.</i> 1904, Feb. 18.	}	<hr style="width: 10%; margin: 0 auto;"/> <i>L. P. A. No. 67 of 1903.</i>
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*Onu of proving negligence—Bullock given in good condition—Return of the same with a broken leg on having been shod.*

Where the plaintiff handed over a bullock in good condition to the defendant to be shod and the bullock was found to have a broken leg when returned.

*Held* that the onus of proving absence of negligence was on the defendant; that the fact that the defendant was an experienced man in the trade only made the onus all the more heavy.

*P. R. Sundara Aiyar* for appellant.

*T. Subrahmanya Aiyar* for respondent.

*Davies J.*  
*Benson J.*  
 1904, Feb. 23.

} S. A. No. 612 of 1902.

*Malabar law—Senior Anandravan, authorized by the Karnavan by a Karar, to manage the Tarwad properties and conduct litigation—Right of such senior Anandravan to institute a suit to recover Tarwad lands, in his own name as plaintiff—S. 37, C. P. C.*

A senior anandravan of a Malabar Tarwad was authorised by the karnavan by means of a karar to manage the tarwad properties and conduct litigations on behalf of the Tarwad. The senior anandravan instituted this suit in his own name as plaintiff, to recover possession of certain tarwad lands held by certain tenants under the Tarwad. The karnavan was made a defendant in the case. On an objection being raised that the plaintiff was only an agent of the karnavan, and as an agent, he cannot institute a suit in his own name under S. 37 of C. P. C., the principal (karnavan) residing within the jurisdiction of the Court :—

*Held*, dismissing the appeal, that the plaintiff could maintain the suit in his own name, as he was not a mere agent, but a co-owner of the properties, and entitled to management under the karar.

*J. L. Rosario* for appellants.

*C. V. Anantakrishna Aiyar* for respondent.

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*Officiating Chief Justice,*  
 1903, March 28.

} C. R. P. No. 385 of 1903.

A person gave a general power of attorney authorising another person to file and conduct suits during his absence from home on account of the Delhi Durbar. The principal left his place on the 11th of December 1902. A suit was filed by the agent on 9th January 1903. The plaint was "returned for compliance with rule 23 of the Rules of Practice, 1903. Time one month." The plaint was re-presented by the pleader on 13th February 1903, by which

time the principal had returned. The District Munsif dismissed the suit on 20th April 1903 on the ground that the re-presentation by the agent was bad, as the principal had returned by that time. Before his Lordship, the Officiating Chief Justice, it was contended on behalf of the respondent that the principal was not non-resident within the meaning of S. 37, C. P. C., so as to entitle him to conduct suits by recognised agents. (2) That even if he can do so, there was no proper plaint at all before the Court as presented by the agent on account of non-compliance with rule 23 of the Rules of Practice and that consequently the dismissal was correct.

*Held* that the term " non-resident " in S. 37 should be construed liberally and that the principal in this case was " non-resident " within the meaning of the section.

2. That the non-compliance with the rule will not invalidate the plaint altogether and the duty of the Court is merely to require a compliance with it and that it should not have been returned at all.

3. The re-presentation by the pleader was sufficient to make it good.

*P. R. Sundara Aiyar* for petitioner.

*V. Krishnaswami Aiyar* and *S. Srinivasa Aiyar* for respondent.

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<i>Davies J.</i> <i>Benson J.</i> <i>Russell J.</i> 1904, March 29.	}	A. No. 223 of 1901.
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*Hindu Law—Adoption—Agreement between natural father and adoptive mother regarding the enjoyment of property—Binding nature of, on adopted son.*

An agreement was entered into between the natural father of the adopted boy and the adoptive mother before the adoption took place, whereby it was agreed that the adoptive mother was to enjoy a moiety of the property of her husband. The permission given to the widow to adopt was oral and merely enabled her to adopt a son, and made no reference as to the terms of the

enjoyment of the estate by either the widow or the adopted son. After the adoption a document (Exhibit I in the case) was executed by the widow setting forth the terms of the agreement. The plaintiff, adopted son, sued for recovery of the properties given to the widow under the deed. Their Lordships (*The Officiating Chief Justice* and *Mr. Justice Benson*) referred the following question to the Full Bench.

“ Whether the provision in the deed (Ex. I) in favour of the 1st defendant (the widow) will bind the plaintiff ?”

Their Lordships in Full Bench answered the question in the affirmative.

*P. R. Sundara Aiyar* and *T. V. Vaidynatha Aiyar* for appellant.

*S. Subrahmanya Aiyar* for respondent.

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<i>Officiating Chief Justice,</i> <i>Benson J.</i> 1904, March 29.	}	<i>C. M. A. No. 80 of 1902.</i>
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*Jurisdiction—Lower Court functus officio—Review by lower court pending appeal.*

The plaintiff's suit was dismissed on the ground that the person who held a general power of attorney to conduct suits on plaintiff's behalf, had agreed to withdraw the suit. The plaintiff put in a petition for review, on the ground that the agent had no power to withdraw. Before it was disposed off, he preferred an appeal to the High Court from the decree dismissing his suit. After the appeal was filed, the lower Court reviewed its decision and restored the suit. *Held* that after an appeal was preferred from a decision and admitted, the lower Court was *functus officio* and could not review its decision.

*S. Srinivasa Aiyangar* for appellant.

*P. R. Sundara Aiyar* and *C. V. Anantakrishna Aiyar* for respondent.

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Chief Justice,  
Davies J.  
1904, April 6.

} Cr. A. No. 81 of 1904.

*District Municipalities Act, S. 170—License for temporary erections—Applications for license after erection—Grant of license—Subsequent prosecution for erection without license.*

S. 170 of the District Municipalities Act empowers the Chairman to give a license after erection.

No prosecution can be launched in respect of any (temporary) erection without previously procuring a license, subsequent to the grant of a license on an application for the same made after the erection.

The *Public Prosecutor* (*E. B. Powell*) for the Crown.

*T. Ethiraja Mudaliyar* for respondent.

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Subrahmaniam Aiyar J.  
Boddam J.  
1904, April 8.

} C. M. A. No. 177 of 1903.

*C. P. C. S. 556—Dismissal for default.*

When an appeal was called on, the vakil was absent. The Judge did not dismiss it at once; and on the vakil appearing a little while after and requesting him to hear the appeal, the Judge thought the excuse offered by the vakil for his absence, unsatisfactory and dismissed it for default. Hence the appeal.

*Held*, that S. 556, C. P. C., did not apply, as there could be no dismissal for default when the vakil was present.

*M. R. Ramakrishna Aiyar* for appellant.

*L. Chamier* for respondent.

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Subrahmania Aiyar, J. }  
 Boddam, J. } A. No. 9 of 1902.  
 1904, April 8.

*Hindu Law—Partition suit—Parties—Practice.*

A Hindu can sue his brothers for partition of the joint family estate without making his own sons parties to the suit.

V. Krishnaswami Aiyar for appellant.

K. Srinivasa Aiyangar for P. R. Sundara Aiyar for respondent.

Subrahmania Aiyar, J. }  
 Boddam, J. } A. No. 23 of 1902.  
 1904, April 15.

*Practice—Procedure—Receiver instituting suit—Death of Receiver—New Receiver—Bringing of new Receiver on record.*

When a Receiver appointed by a Court pending litigation, sues or is sued in his capacity as Receiver and ceases to continue as such while the suit is pending, and a new Receiver is appointed, the new Receiver should be brought on record before the suit instituted by the old Receiver can be further proceeded with.

V. Krishnaswami Aiyar for appellant.

Sir V. Bhashyam Aiyangar, P. R. Sundara Aiyar and C. R. Tiruvenkatachariar for respondent.

Subrahmania Aiyar, J. }  
 Boddam, J. } S. A. No. 1219 of 1902.  
 1904, April 15.

*Res judicata—Suit, maintainability—Prior suit for redemption by assignee of mortgagor—Second suit by subsequent assignee.*

The plaintiff was the appellant. The suit was for redemption. The plaintiff was the assignee of the equity of redemption from the mortgagor (jenmi), the 6th defendant in the case. Prior to the present suit, another suit for redemption was instituted by a stranger assignee from the 6th defendant. To that suit, the mortgagor (6th defendant) was a party, and it was decided therein that the property belonged to the 6th defendant and that the stranger assignee was entitled to redeem. But the property was not in fact redeemed. On a subsequent assignment from the 6th defendant—mortgagor to the plaintiff, this suit was brought.



*Held* :—The decision in the prior suit on the question of title of the property will not operate as *res judicata* in the present suit; and that the plaintiff herein is not debarred from maintaining the present suit.

*P. B. Sundara Aiyar* for appellant.

Respondent not represented.

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<i>Davies, J.</i> <i>Benson, J.</i> 1904, April 15.	}	<i>S. A. No. 971 of 1902.</i>
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*Malabar Law—Karnavan, decree against—Binding nature of decree on others—Fraud Negligence.*

A decree obtained against the karnavan of a Malabar Tarwad in his representative capacity, will be binding on the other members of the Tarwad unless there was fraud as distinguished from negligence of any kind. 20 M. 129 F. B. explained. The decree can be impeached only on the ground of fraud or collusion.

*P. B. Sundara Aiyar* and *M. R. Sankara Aiyar* for appellant.

*K. P. Govinda Menon* for respondent.

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<i>Subrahmaniam Aiyar, J.</i> <i>Boddam, J.</i> 1904, April 15.	}	<i>S. A. No. 529 of 1903.</i>
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*Rent Recovery Act—Rent—Pattah—Stipulation, certain.*

Grain or money stipulated to be paid by the tenant even on default of cultivation is rent.

A stipulation which ran as follows “should I lay waste ..... you shall collect and recover from me according to law, the total proportionate melwaram including the Swathanthrams thereof” is not bad for uncertainty.

*P. B. Sundara Aiyar* and *P. V. Ramachandra Raju* for appellant.

*P. S. Sivaswami Aiyar* for respondent.

## RECENT CASES.

*Subrahmania Aiyar, J.*  
*Sankaran Nair, J.*  
1904, July 22. } *L. P. A. No. 6 of 1904.*

*Commission—Examination of witness—Witness within jurisdiction of court—Jurisdiction to issue commission.*

A court has no jurisdiction to issue a commission for the examination of a witness residing within the local limits of the jurisdiction of the court, unless he or she is exempted from appearance in court.

*P. S. Sivaswami Aiyar* for appellant.

*S. Srinivasa Aiyangar* for respondent.

*Subrahmania Aiyar, J.*  
*Sankaran Nair, J.*  
1904, July 28. } *S. A. No. 264 of 1903.*

*Civil Procedure Code, S. 244—Transfer of part of decree—Application for execution—Representative—Suit—Execution.*

A transferee of a part of the subject-matter of a decree is not a representative and cannot claim to be brought on the record as such.

Where a person purchased in court auction properties comprised in a decree obtained by his judgment-debtor and his application to execute the decree was dismissed by the court under S. 232, C. P. C., and he brought a regular suit to recover them:—

*Held*, that he was not a representative as the decree comprised mesne profits and costs also which had not passed to the transferee and was therefore entitled to bring a suit; but that if he was bound to proceed in execution, the suit may be treated as an execution petition having been preferred in the proper court and within the time limited therefor.

*R. Subrahmania Aiyar* for appellant.

*V. Visvanatha Sastri* for respondent.

*Subrahmania Aiyar, J.*  
*Sankaran Nair, J.*  
 1904, July 15.

} *C. M. S. A. No. 100 of 1903.*

*Jurisdiction—Personal decree against son—Execution—Objection to decree.*

A personal decree against a son for the father's debt, under circumstances not justifying it, is not absolutely beyond the jurisdiction of the court to pass, and the court executing the decree cannot go behind the decree and refuse execution of it as invalid.

*P. S. Sivaswami Aiyar* for appellant.

*S. Kasturiranga Aiyangar* for respondent.

*Subrahmania Aiyar, J.*  
*Sankaran Nair, J.*  
 1903, July 15.

} *C. M. S. A. No. 12 of 1904.*

*Leave to bid—Condition assented to by decrees-holder—Condition binding—Time to pay—Delay—Act of officer of court.*

A condition in an order granting leave to bid, that the decree-holder should give up the property if purchased by him, if within 30 days of sale the judgment-debtor pays the decree amount, is valid and the sale might be set aside on payment of money within that period.

If an officer of court refused to receive money which he was bound to receive or to issue a chellan for payment which he was bound to issue, the delay arising from such refusal should not be counted against the party who was ready to pay in time and was not in any way to blame for the delay.

*T. V. Seshagiri Aiyar* for appellant.

*P. S. Sivaswami Aiyar* for respondent.

Chief Justice.  
 Subrahmania Aiyar, J. } C. M. P. No. 40 of 1904.  
 Davies, J.  
 1904, July 18.

*Jurisdiction—Ad-interim injunction pending appeal against an order refusing injunction pending suit—C. P. C., Ss. 582, 587, 590, 647.—“Procedure”—“Provisions.”*

*Held, by the Chief Justice and Subrahmania Aiyar, J. (Davies, J. dissentiente) that an appellate court is competent to grant an ad-interim injunction pending an appeal from an order of the lower court refusing an injunction pending suit.*

*Davies, J. :—The “procedure” mentioned in S. 590 is not the same as “provisions” mentioned in S. 587.*

*P. S. Sivaswami Aiyar* for petitioner.

*Sir V. Bhashyam Aiyangar and V. Krishnaswami Aiyar* for respondent.

Chief Justice.  
 Davies, J. } S. A. No. 616 of 1903.  
 1904, July 27.

*C. P. C., S. 244—Question in Execution raised as a plea in defence—No bar.*

S. 244, C. P. C., does not bar a question relating to the execution of a decree being raised as a defence in a subsequent suit. It only prohibits a person from coming forward as a plaintiff in a fresh suit and raising a question which ought to have been decided in execution of a previous decree to which he and the defendant were parties.

*C. Ramachandra Row Sahib and R. Kuppusami Aiyar* for appellant.

*P. S. Sivaswami Aiyar* for respondent.

Subrahmania Aiyar, J. }  
 Sankaran Nair, J. } C. M. A. 7 & 8 of 1904.  
 1904, August 2.

*Res judicata—Ground of decision—Ambiguity—Estoppel.*

No decision can operate as *res judicata* on any point on which the court does not clearly appear to have pronounced judgment either on the face of the decision itself or on extrinsic evidence as to what was the ground of decision. If there was the least doubt as to whether the point was decided, the decision cannot operate to estop the parties from raising the point.

Where the court of 1st instance decided the case on one ground and the appellate court affirmed the decision for reasons inconsistent with the ground of the decision of the 1st Court and the High Court "saw no reason to interfere and dismissed the appeal."

*Held*, that there was no certainty as to whether the High Court proceeded on the grounds given by the Appellate Court or on the grounds given by the 1st Court and that the decision could not operate as *res judicata* on either point.

*V. Krishnasami Aiyar* (with *K. Srinivasaiyengar* and *T. V. Gopalasami Mudaliar*) for appellant.

*C. Ramachandra Row Saheb* for respondent.

Subrahmania Aiyar, J. }  
 Sankaran Nair, J. } C. R. P. No. 101 of 1904.  
 1904, August 3.

*Civil Procedure Code, Ss. 622, 335—Application by purchaser for possession—Obstruction by representative of judgment-debtor.*

An obstruction by the representative of a judgment-debtor (whether brought on the record as such or not) to the purchaser getting possession of the properties purchased is not an obstruction by a person other than the judgment-debtor within S. 335, C. P. C., and if the court purported to proceed under S. 335 the order is liable to be set aside as passed without jurisdiction.

*V. Krishnaswami Aiyar* and *T. R. Venkatarama Sastri* for petitioner.

*K. Srinivasaiyengar* for *P. R. Sundara Aiyar* for respondents.

*Subrahmania Aiyar, J.*  
*Sankaran Nair, J.* } C. M. A. No. 83 of 1904.  
 1904, August 3.

*Civil Procedure Code, S. 244—Decree-holder purchaser—Representative of debtor—Obstruction to possession—Appeal—Reversioner—Purchaser pendente lite—Representative.*

An application by a decree-holder purchaser to get possession of properties purchased by him, to which objections are raised by a representative of judgment-debtor, is one to be disposed of under S. 244 and an appeal will lie against the order.

A having obtained a mortgage decree against the estate of a deceased man in the hands of his two adoptive mothers purchased the property in execution. On an application to be put in possession, he was obstructed by one who claimed to have got into possession as reversioner on the death of one of the widows pending execution and who produced a release deed from the other widow in which she stated she was not adoptive mother of the deceased man and was not entitled to possession.

*Held*, that the obstructor was the representative of the judgment-debtor either as reversioner (because the decree was not against the widows personally but against the estate then in their hands) or as purchaser of properties *pendente lite* from the judgment-debtor.

*Semble* :—That a man may have two adoptive mothers.

*V. Krishnaswami Aiyar and T. R. Venkatarama Sastri* for appellant.

*K. Srinivasaiyengar and T. V. Gopalasami Mudaliar* (with *P. R. Sundara Aiyar*) for respondents.

Subrahmaniam Aiyar, J.  
Sankaran Nair, J. } S. A. No. 981 of 1902.  
1904, August 3.

*Practice—Plea of limitation not taken in the first two courts—  
Second appeal against portion of a decree—Point not allowed  
to be taken in second appeal—Limitation Act, S. 4—“The  
suit.”*

The plaintiff brought a suit for a certain sum of money. Defendant admitted his liability in part and contested the rest of the claim. A decree was passed for the whole amount. The defendant first filed an appeal and then a second appeal against the decree in so far only as it related to the portion not admitted by him. In second appeal for the first time, the defendant pleaded limitation.

*Held, following Alimunnissa Khatoon v. Syed Hossein Ali and Raghunath Singh Manku v. Paresram Mahata\*, that when the appeal related to a part only of the decree, the court is not bound to dismiss the claim covered by the appeal as barred by limitation.*

*K. Srinivasa Aiyangar* for appellant.

*S. Srinivasa Aiyangar* for respondent.

Subrahmaniam Aiyar, J.  
Sankaran Nair, J. } S. A. No. 1270 of 1902.  
1904, August 4.

*Parties—Non-joinder—Suit for damages on breach of covenant for title—Limitation Act, Article 116.*

A sale deed was executed in favor of two persons A and B. It contained a recital that the purchase money was made up of half the amount received from A and the other half from B. A suit for possession of lands brought by A and B was dismissed on the ground that the vendor had no title to the property sold. Subsequently, A alone brought the present suit for money advanced by him with interest as damages for breach of the covenant for title.

1. 6 C. L. R., 287.

2. I. L. R., 9 C. 635.

*Held*, that the vendees' interests under the sale deed were several and that the suit was not bad for non-joinder of B.

The suit is governed by Article 116 of the Limitation Act, even though the covenant itself was not in writing registered.

*V. Krishnaswami Aiyar* and *S. Srinivasaiyar* for appellant.

*K. Srinivasaiyengar* for respondent.

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*Subrahmania Aiyar, J.*  
*Sankaran Nair, J.*  
 1904, August 5. } *S. A. No. 991 of 1902.*

*Civil Procedure Code, Ss. 244, 253—Surety—Execution—Suit.*

A surety liable to be proceeded against under S. 253 cannot claim exoneration on any ground in a regular suit, but must urge his objections under S. 244 by way of appeal and second appeal.

*Held*, that a suit by a surety for a declaration that he was not liable to be proceeded against in execution was barred by S. 244, C. P. C.

*Ex parte Bhikaji<sup>1</sup> Gharee Lal Jha v. Sheo Narain Singh<sup>2</sup>, Akhoo Ramanah v. Ahmed Eusooffjee<sup>3</sup>, Shek Suleman v. Shivan Bhikaji<sup>4</sup>, Thirumalai v. Ramayyar<sup>5</sup> followed<sup>6</sup>.*

*Veerabhadra Mudaliyar* for appellant.

*P. Naghabhushanam* for respondent

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*Subrahmania Aiyar, J.*  
*Sankaran Nair, J.*  
 1904, August 10. } *C. M. S. A. No. 5 of 1904.*

*Decree against public policy—Decree not executable—Objection in execution.*

A mortgage decree directing the sale of land forming part of a service inam being contrary to the provisions of Act II of 1894 and III of 1895 (Madras) and opposed to public policy is null and void.

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1. 4 B. H. C (A. C.)  
 2. 8 W. R. 24.

3. 15 W. R. 538.  
 4. I. L. R., 12 B. 71.

5. I. L. R., 13 M. 1.  
 6. 13 M. L. J., 484.



Such a decree is not executable and an objection that it is not executable can be taken in execution.

*Obiter.* Where only the rights of individuals are involved as opposed to any principle of public policy, an objection to the non-executable character of the decree may be waived.

*T. Rangachariar* for appellant.

*V. Ramesam* for respondent.

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<p><i>Subrahmania Aiyar, J.</i>  <i>Sankaran Nair, J.</i>  1904, August 10.</p>	}	<p><i>C. M. S. A. No. 34 of 1903.</i></p>
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*Appeal—Limitation Act, Art. 178—Partition decree—Order declaring shares—Application to appoint a Commissioner—Order of dismissal—Minor.*

An order for partition was passed whereby the petitioner in execution became entitled to  $\frac{1}{4}$ th share of the suit property. More than 3 years after the order, the petitioner applied for appointment of a Commissioner. The Sub-Judge held that it was an application for execution and therefore barred. On appeal the District Judge, holding that the application was not one in execution and therefore not barred remanded the application for disposal according to law. Against that order of the District Judge the present appeal was preferred. It was contended for the appellant that no appeal lay from the Sub-Judge's order to the District Judge, the order not being one passed in execution but before the final decree. It was also contended that Article 178 applied to the case inasmuch as it was not an application in execution.

*Held*, that inasmuch as the order of the Sub-Judge had the effect of putting an end to the whole litigation, an appeal lay from the order.

*Held* also that, assuming the application was one made before the final decree, but one with a view to make the court pass a final decree, Article 178 did not apply to it.

Also that even if the order of the Sub-Judge declaring the share was to be taken as a final decree, then the petitioner being a minor at the time of the previous application for execution, the present application was not barred.

*V. Krishnaswami Aiyar and T. Rangaramanujachariar* for appellant.

*Sir V. Bhashyam Aiyangar, C. V. Anantakrishna Aiyar and S. Srinivasa Aiyangar* for respondent.

<i>Davies, J.</i>	}	<i>S. A. No. 1316 of 1902.</i>
<i>Sankaran Nair, J.</i>		
<i>1904, August 10.</i>		

*Civil Procedure Code, S. 375—Compromise not made a decree of court—Suit on the compromise agreement—Bar.*

The fact that a compromise which could have been made a decree of court was not put before the court and made a decree of court and the suit was dismissed for want of prosecution is no bar to a subsequent suit on the compromise.

*T. R. Venkatarama Sastri* for *P. S. Sivaswami Aiyar* for appellant.

*K. Srinivasa Aiyangar* for *P. R. Sundara Aiyar* for respondent.

<i>Subrahmania Aiyar, J.</i>	}	<i>S. A. No. 1086 of 1902.</i>
<i>Boddam, J.</i>		
<i>1904, August 11.</i>		

*Evidence Act, Ss. 107, 108—Suit by reversioner on death of widow—Widow last heard of prior to 12 years before suit—Presumption—Onus of proof.*

A reversioner entitled to the estate on the death of a Hindu widow brought a suit to recover possession of the estate on the

20th June 1898. It was proved that the widow in possession was last heard of on 17th March 1886.

*Held*, that though the presumption of the death of the widow arose only on 17th March 1893, the onus was on the plaintiff to prove that the widow died within 12 years prior to suit and that the suit fails in the absence of proof by plaintiff that the widow was living within 12 years prior to suit.

*V. Krishnaswami Aiyar and K. Subrahmaniya Sastri* for appellant.

*T. R. Ramachandra Aiyar and V. Ramesam* for respondent.

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Davies, J.  
Sankaran Nair, J. } S. A. No. 362 of 1903.  
1904, August 11.

‘*Kasavargam*,’ meaning of—Proof in cases of alleged ‘*Kasavargam*.’

“*Kasavargam*” has no definite meaning and cannot always be taken to indicate a tenancy in which the tenant is liable to be ejected at the pleasure of the landlord.

In all cases of alleged *Kasavargam* tenancy proof must be adduced that the landlord let in the tenant or received rent either in money or in services. The use of the word *Kasavargam* in the *paimash* register is not enough to entitle the mirasdars to eject the occupant. *Subbaraya v. Nataraja*<sup>1</sup> and *Athakutti v. Govinda*<sup>2</sup> distinguished.

*S. Gopalaswami Aiyangar* for appellant.

*T. R. Venkatarama Sastri* for *P. S. Sivaswami Aiyar* for respondent.

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1. I. L. R., 14 M. 98.

2. I. L. R., 16 M. 97.

## RECENT CASES.

*Subrahmania Aiyar, J.*  
*Boddam, J.*  
1904, August 8. } *C. M. A. No. 51 of 1904.*

*Hindu widow—Maintenance—Agreement to pay fixed sum—Claim for increase—Altered circumstances—Maintainability of suit.*

A Hindu widow was entitled under a *karar* (agreement) entered into between herself and her husband's brother to a certain sum of money per year for her maintenance. She filed a suit to have an increased rate of maintenance, alleging that the family properties had increased very much and that the amount fixed by the *karar* was not enough at present for her expenses. The suit having been dismissed by the District Munsif as not maintainable, the District Judge on appeal reversed the Munsif's decree and remanded the suit for disposal on the merits. On its being contended, in this appeal against the remand order, that the courts had no power to modify the amount fixed by the *karar* for the maintenance of the plaintiff.

*Held*, that the suit was maintainable, as the *karar* contained no clause by which the widow gave up all her rights to future enhancement of the amount if altered state of circumstances necessitated the same, and that the order of remand was right.

*T. B. Ramachandra Aiyar* for appellant.

*V. Krishnaswami Aiyar* and *C. V. Anantakrishna Aiyar* for respondent.

*Davies, J.*  
*Sankaran Nair, J.*  
1904, August 11. } *S. A. No. 550 of 1902.*

*Devaswom property—Uraima rights of illom—Sarvaswadanom son-in-law—No alienation—Son-in-law entitled to Uraima rights.*

Plaintiff who, as Sarvaswadanom son-in-law, was entitled to the properties of a Nambudri Illom sued to eject the tenants of a Devaswom, over which that Illom had uraima rights. The tenant, appellant, contended in second appeal that the plaintiff had not

acquired the uraima rights over the Devaswom, which the Illom possessed, and was not consequently entitled to sue to eject a tenant of the Devaswom, because uraima rights (trusteeship) could not be acquired by a stranger.

*Held*, that a Sarwaswadanom son-in-law, who was entitled to the properties of the Illom, was also entitled to the uraima rights (trusteeship) which that Illom possessed over the Devaswom, and that he could maintain a suit to eject a tenant holding lands under the Devaswom.

*J. L. Rosario* for appellant.

*C. V. Anantakrishna Aiyar* for *P. R. Sundara Aiyar* for respondent.

<p><i>Chief Justice,</i> <i>Subrahmania Aiyar, J.</i> 1904, August 28.</p>	}	<p><i>S. A. No. 1379 of 1902.</i></p>
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*Composition-deed—Liquidator under composition paying debts—  
No release of rights by creditor—Suit by creditor for balance  
of debt—Maintainability—Acknowledgment.*

Where a debtor executed a composition deed by which he appointed a liquidator to realise his assets and to pay his creditors fully if funds permitted, or to pay them rateably towards the satisfaction of their debts, and the liquidator realised the assets and paid the same rateably among the creditors, the District Judge of South Canara held that the suit brought by one of the creditors for the balance of the debt due to him was not maintainable, and that payments made by the liquidator could not save limitation. On plaintiff preferring a second appeal against the District Judge's decision.

*Held*, (1) that the suit was maintainable, as the deed contained no words of release, whereby the creditors gave up any of their rights, and (2) that the payments made by the liquidator saved the debt from being barred by limitation.

*C. V. Anantakrishna Aiyar* for *P. R. Sundara Aiyar*, for appellant.

*K. P. Madhava Row* and *A. Srinivasa Poi* for respondent.

Boddam, J.  
Sankaran Nair, J.  
1904, September 9.

} S. A. No. 1475 of 1902.

*T. P. S. S., 85—"Property"—Physical property—Prior mortgage not made party in the lower appellate Court—Practice.*

The plaintiff sued on a hypothecation bond for recovery of the amount by sale of the properties, impleading a prior usufructuary mortgagee of some of the items of the mortgaged property. On appeal from the first court's decree, he did not implead the prior mortgagee and on objection taken in the appellate court, he answered that inasmuch as any decree on his mortgage will be only subject to the prior mortgagee's rights, it was unnecessary to make him a party. The objection was overruled and a decree was passed in plaintiff's favor. On second appeal,

*Held*, that the prior mortgagee was a necessary party in the appeal before the lower court.

That the word "property" in S. 85 means tangible property.

*V. Krishnaswami Aiyar and S. Srinivasa Aiyar* for appellant.

*T. R. Venkatarama Sastri* for respondent.

Subrahmania Aiyar, J.  
Boddam, J.  
1904, September 19.

} S. A. No. 1317 of 1902.

*Mortgagee in possession—Covenant by mortgagee to pay kist—Enhancement of kist—Liability of mortgagee to pay the extra amount—Suit by mortgagor for money paid by him for kist, maintainability.*

A usufructuary mortgagee covenanted to enjoy the mortgaged properties in lieu of interest due on the mortgage amount and himself pay the Government assessment on the property "completely" till the day of redemption. The Government assessment was subsequently enhanced. The mortgagee paid only a part of the old assessment amount but refused to pay the balance of the old assessment and the extra assessment newly imposed. The

mortgagor paid the balance and sued the mortgagee for the money. It was found that the mortgagee was paying the extra assessment for 3 years after it was newly imposed and at the time of the present payment by the mortgagor, the mortgage money had become due under the covenant to pay contained in the deed. The Munsif passed a decree against the mortgagee only for the balance of the amount of the old assessment and held that he was not liable to pay the extra assessment. The District Judge confirmed the Munsif's decree on the appeal by the mortgagor. The mortgagee did not appeal against the decree of the Munsif which made him liable for the unpaid portion of the old assessment. This second appeal was by the mortgagor.

*Held*, on the question of construction, that the extra assessment could not have been in the contemplation of the parties at the time of the contract and that the mortgagor was liable to pay the extra assessment.

*Quere*: whether the mortgagor can maintain the suit against the mortgagee without offering to redeem.

The mortgagee not having objected to the decree of the first Courts against him for the balance of the old assessment not paid by him, their Lordships did not think it necessary to decide the latter question.

*R. Kuppusami Aiyar* for appellant.

*S. Srinivasa Aiyar* for *V. Krishnaswami Aiyar* for respondent.

<i>Subrahmania Aiyar, J.</i>	} <i>C. M. A. No. 178 of 1904.</i>
<i>Boddam, J.</i>	
1904, September 20.	

*Hindu Law—Mortgage debt of father—Son's liability.*

A son cannot be made personally liable for mortgage debts incurred by his father. The decree should simply direct the recovery of the balance that may be found due after sale of the mortgaged properties from the joint family assets.

*V. Ramesam* for appellant.

*S. Srinivasa Aiyar* for *V. Krishnaswami Aiyar* for respondent.

Subrahmaniu Aiyar, J.  
Boddam, J. } S. A. No. 1305 of 1902.  
1904, September 21.

*Registration, effect of—Does registration by itself pass title?*

Registration does not by itself pass the title in the property in all cases.

Where the parties to a conveyance intended that title should pass only on the happening of a future event, (in this case the condition being that the vendee should give his daughter in marriage to the vendor) and the vendor keeps possession of the deed and remains in possession of the property also :—

*Held* :—That mere registration did not pass the title in the property to the vendee. 27 C. 7; 18 M. 61 followed. 17 M. 146 distinguished.

*T. Rangachariar* for appellant.

*V. Krishnaswami Aiyar* and *S. Srinivasa Aiyar* for respondents.

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Davies, J.  
Sankaran Nair, J. } S. A. No. 1299 of 1902.  
1904, September 28.

*C. P. C., S. 11—“Suit of a civil nature”—Suit not cognizable by a Civil Court.*

A suit for a declaration that a certain idol in a certain temple is the idol of Yemberumanar and not that of Manavala Mamuni, and for an injunction restraining the defendants from taking the idol in procession as Manavala Mamuni is not a suit of a civil nature and is therefore not cognizable by a Civil Court.

*T. V. Seshagiri Aiyar* for appellant.

*T. Natesa Aiyar* for respondent.

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Davies, J.  
 Sankaran Nair, J. } C. B. P. No. 43 of 1904.  
 1904, Sept. 29.

*Post Office Act, S. 34, proviso—Insured Value Payable parcel—Parcel delivered without receiving money from addressee—Liability of Secretary of State—Negligence of Post Office—Contract with Post Office—Provincial Small Cause Courts Act, Sch. II, Art. 3.*

The plaintiff sent insured a value payable parcel from Trichinopoly Post Office to a person at Colombo. On the same day another article was sent to the same person from the same Post Office by another person. By the negligence of the Post Office at Trichinopoly the slips on the two articles were changed and, consequently, plaintiff's articles were delivered to the addressee at Colombo as non-value payable parcel, without any money being collected. Plaintiff sued the Secretary of State for the value of the articles.

*Held:—That the Secretary of State was liable in damages for breach of contract entered into by the Post Office at the time of the acceptance of the goods for delivery on receipt of money.*

2. That the suit is one cognizable by a Court of Small Causes, and that Art. 3 of Sch. II of the Provincial Small Cause Courts Act has no application.

*V. Venkatachariar* for petitioner.

*John Adam* (The Government Pleader) for The Secretary of State.

Davies, J.  
 Sankaran Nair, J. } S. A. No. 415 of 1903.  
 1904, September 29.

*Limitation—Appeal presented on last day after office hours—Practice.*

An appeal was presented against the judgment of the Head Assistant Collector in a summary suit under Act VIII of 1865 setting aside a distraint as illegal. The appeal was rejected with the following endorsement: "Presented after office hours on 17th December 1902, cannot be admitted". This order was passed on the 18th.

Their Lordships held that the order was bad and directed the lower court to restore the appeal to its file and dispose of it according to law. No costs were allowed to the appellant.

*T. Rangaramanuja Chariar* for appellant.

*T. R. Krishnaswami Aiyar* for respondent.

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<i>Davies, J.</i> <i>Sankaran Nair, J.</i> 1904, September 29.	}	<i>S. A. No. 608 of 1903.</i>
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*Rent Recovery Act, S. 39—Tender of pattah—Personal tender, when necessary.*

Where objection was taken that the tender was not good, not being a personal one,

*Held*, that before considering whether personal tender is necessary, it should be found whether personal tender can reasonably be effected in the particular case.

*Held* also, that the distance and means of communication are the factors to be taken into consideration in the particular case in coming to a finding.

*C. B. Tiruvenkata Chariar* for appellant.

*K. Subrahmanya Sastri* for respondent.

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<i>Davies, J.</i> <i>Sankaran Nair, J.</i> 1904, September 14.	}	<i>C. R. P. No. 401 of 1903.</i>
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*Negotiable Instrument, suit on—Plea of benami.*

In a suit upon a negotiable instrument, the defendant cannot plead that the plaintiff is only a benamidar.

*T. Subramanya Aiyar* for appellant.

*C. Venkatasubbaramiah* for respondent.

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Davies, J.  
Sankaran Nair, J. } S. A. No. 1099 of 1902.  
1904, August 10.

*Limitation Act, Arts. 132, 147—Hypothecation.*

*Held*, that all hypothecations are mortgages and that art. 147 applies and not art. 132.

*T. V. Seshagiri Aiyar* for appellant.

*P. S. Sivaswami Aiyar* for respondent.

Davies, J.  
Sankaran Nair, J. } S. A. No. 1213 of 1902.  
1904, August 23.

*C. P. C., Ss. 13 and 43—First suit on pro-note—Pro-note found to be a forgery—Second suit on the real pro-note admitted in the pleadings in the prior case.*

Plaintiff brought a suit on a pro-note. The pro-note sued on was found to be a forgery. But in the pleadings in the case the defendant admitted the loan as due on another pro-note of the same date. A second suit was brought on the alleged true pro-note.

*Held*, that Ss. 13 and 43 were a bar to the suit.

*T. V. Seshagiri Aiyar* for appellant.

*V. Ramesam* for respondent.

Chief Justice  
Subramania Aiyar, J. } C. M. A. No. 76 of 1904.  
1904, August 31.

*Trustee—Suit brought as trustee—Execution personal liability.*

*Held* :—that in execution of a decree in a suit brought by the plaintiffs as trustee on behalf of a temple—only trust property can be proceeded against, that the trustee was not personally liable and that he was, therefore, not liable to be arrested.

*T. Natesa Aiyar* for appellant.

*T. Rangchariar* and *T. V. Muthukrishna Aiyar* for respondent.

## RECENT CASES.

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*Subrahmania Aiyar, J.* } *S. A. No. 532 of 1903.*  
*1904, September 12.*

*Mahomedan Law—Dower—Second marriage.*

*Held*, that a divorced Muhammadan woman was entitled to dower from her second husband, when the marriage with him has been consummated, though the marriage took place before the period of *Iddat* within 34 days after her divorce by her first husband.

*C. V. Anantakrishna Aiyar* for appellant.

*B. Govindan Nambiar* for respondent.

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*Subrahmania Aiyar, J.* } *C. M. A. No. 93 of 1904.*  
*Davies, J.*  
*1904, September 22.*

*Limitation Act, Art. 36, 49—Suit by mortgagee against mortgagor's tenant in common—Suit for value of trees felled by tenant in common.*

Plaintiff held a mortgage over certain immoveable property and the trees standing thereon. The present defendant, who was a tenant in common with the mortgagor of the immoveable property, cut the whole of the trees standing on the land, sold the same and himself pocketed the whole of the sale proceeds. The plaintiff not being able to recover the whole of his mortgage money by the sale of the land, brought this suit two and a half years after the defendant had sold the trees, to recover from the defendant the balance due to the plaintiff of his mortgage amount. The District Munsif dismissed the suit as barred by limitation, holding that Article 36 of the Limitation Act applied. The District Court on appeal reversed the Munsif's judgment, and remanded the suit for disposal on the merits, holding that Article 49 applied, and plaintiff had 3 years to sue. On this appeal against the order of remand,

*Held*, (1) that the plaintiff had a cause of action against the defendant, and (2) that the suit was not barred by limitation, as the plaintiff had at least 3 years under Art. 49.

*T. V. Seshagiri Aiyar* for the appellant (defendant).

*C. V. Anantakrishna Aiyar* for respondent (plaintiff).

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<i>Subrahmania Aiyar, J.</i>	} <i>C. R. P. No. 401 of 1903.</i>
<i>Davies, J.</i>	
1904, October 25.	

*Negotiable Instrument, suit on—Plea of benami.*

Per *Subrahmanya Aiyar, J. (Davies, J. dissentient)*. In a suit upon a negotiable instrument before it was ever negotiated the defendant can plead discharge by payment to the real owner.

Per *Davies, J.*:—A person though really entitled to the money due on a negotiable instrument cannot maintain a suit on it if it has been executed in the name of another and the defendant cannot plead discharge by payment to the real owner. L. P. A. No. 24 of 1904 referred to.

*T. Subrahmania Aiyar* for petitioner.

*C. Venkatasubbaramiah* for respondent.

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<i>Boddam, J.</i>	} <i>L. P. A. No. 16 of 1904.</i>
<i>Sankaran Nair, J.</i>	
1904, October 25.	

*Provincial Small Cause Courts Act, Art. 31—Suit for account.*

Plaintiff brought a suit for a certain sum of money due as on settlement of accounts in the Small Cause Court. The District Munsif found that there was no settlement, but finding from the accounts that a sum was due to plaintiff decreed the same to plaintiff. On revision his Lordship Mr. Justice Russell being of opinion that the suit was one for accounts and that it was not cognizable by a Small Cause Court, set aside the decree of the District

Munsif and ordered the plaint to be presented to the proper court. Hence this Letters Patent Appeal.

*Held* :—That every suit in which accounts have to be looked into is not a suit for account and that the present suit is not one for account. Taking accounts is a special proceeding which should be understood in its technical sense.

*M. A. Tirunarayana Chariar* for appellant.

*S. Subrahmania Aiyar* for respondent.

<i>Boddam, J.</i>	}	<i>Cr. Rev. Case No. 236 of 1904.</i>
<i>Sankaran Nair, J.</i>		
1904, October 25.		

*Cr. P. C., S. 520—Sessions Judge's jurisdiction—Court of Appeal from First Class Magistrate.*

The petitioners were charged with theft of timber from a forest and convicted by the Second Class Magistrate who confiscated the timber. On appeal, the Head Assistant Magistrate acquitted them and ordered Government to restore the timber.

The Sessions Judge now reversed this order on the ground that there was a presumption that all fresh produce belonged to Government.

*Held* :—reversing the order of the Sessions Judge, that the Sessions Judge acted without jurisdiction, that S. 520, Criminal Procedure Code, under which he acted, had no application and that he was not a Court of Appeal from the 1st Class Magistrate.

*T. Runga Chari* for petitioner.

*John Adam* for Government.

<i>Boddam, J.</i>	}	<i>L. P. A. No. 24 of 1904.</i>
<i>Sankaran Nair, J.</i>		
1904, October 25.		

*Specific Relief Act, S. 9—Right of suit—Landlord's right to sue on dispossession of tenant—Constructive possession.*

Plaintiff, a landlord, brought the present suit under S. 9, Specific Relief Act. At the time of the dispossession by defendant, the land was held by a tenant. At the time of the suit the lease had expired and the landlord had become entitled to possession. The case

came originally before Mr. Justice Davies who held that the person entitled to sue was the person actually dispossessed, i. e., the tenant.

*Held* :—reversing the judgment that the defendant disturbed the constructive possession of plaintiff and that plaintiff was entitled to come in under S. 9, Specific Relief Act.

*Innasi v. Sivagnana*<sup>1</sup> approved and followed.

*T. V. Seshagiri Aiyar* for appellant.

*T. V. Vayidanatha Aiyar* for respondent.

*Boddam, J.*  
*Sankaran Nair, J.* } *Referred Case No. 5 of 1904.*  
 1904, October 26.

*C. P. C., S. 111—Set-off—Debts due to Company—Company suing for debt through liquidator—Set off, Claim to, of debt due to defendant—Injunction of High Court restraining creditors from suing for debts.*

A Company on going into voluntary liquidation sued the defendant who was not a shareholder at the time of the liquidation for a debt due to the Company. The defendant claimed a set-off of the deposit which he had made with the Company prior to liquidation. The deposit was a fixed deposit for 12 months and though the 12 months had not expired when the Company went into liquidation, it had expired at the date of suit. Meanwhile the liquidator had obtained an injunction from the High Court restraining the creditors of the Company from suing for their debts and from continuing the suits already filed.

The Chief Judge of the Presidency Small Cause Court held that the defendant was not entitled to any set off inasmuch as the debt had not accrued due on the date of the liquidation and referred the question for the opinion of the High Court.

*Held* :—That the defendant was entitled to a set-off inasmuch as the money had become due on the date of suit ; also that the injunction of the High Court restraining the creditors from suing did not preclude their claim to set-off in an action brought by the Company. *Anderson's case*<sup>2</sup> and *Sovereign Life Assurance Co. v. Dodd*<sup>3</sup>, referred to.

*M. A. Tirumarayana Chariar* for plaintiff.

*V. Krishnaswami Aiyar* for defendant.

1. 5 M. L. J. 95.

2. L. R. 8 Eq. 337.

3. (1892) 2 Q. B. 573

Boddam, J.  
Sankaran Nair, J. } C. M. A. No. 4 of 1904.  
1904, October 26.

*Civil Procedure Code, S. 230—Decree for sale—Decree for money—  
Limitation—Attachment—Sale.*

A decree for sale of mortgaged properties is a decree for money under S. 230, C. P. C., and an application for execution of such decree after 12 years should be dismissed as barred. *Kommachi v. Parker*<sup>1</sup> and *Jogemaya v. Thackomoni*<sup>2</sup> followed.

Where in execution of a decree for sale an application for attachment was made within 12 years but sale was asked for only after the lapse of that period :

*Held*, that the first application was unnecessary and not in accordance with law, that the only right application was that for sale made after 12 years and that the application was accordingly barred.

*T. Natesa Aiyar* for appellants.

*T. V. Seshagiri Aiyar* for respondent.

Boddam, J.  
Sankaran Nair, J. } C. M. A. No. 119 of 1904.  
1904, October 27. } C. R. P. No. 196 of 1904.

*Guardian and Wards Act—Custody of minor—Jurisdiction of District Judge to give custody of minor on appointment of guardian.*

A person put in a petition to the District Court for appointment of herself as guardian of a minor. Her maternity was questioned by the counter-petitioner but was found in her favor, and the District Judge appointed her guardian. There was an appeal to the High Court and the High Court confirmed the order of the District Judge. The guardian applied to the District Judge for possession of the ward, but the District Judge held that he had no power to do so under the Guardians and Wards Act and referred her to a regular suit. Hence this appeal and revision petition.

*Held*, that on the appointment of a guardian a Court can order delivery of the minor to the guardian.

*V. Krishnaswami Aiyar* for appellant.

*P. S. Sivaswami Aiyar* for respondent.

1. I. L. R., 20 M. 207.

2. I. L. R., 24 C. 473.



Benson, J.  
Boddam, J.  
1904, November 1. } S. A. No. 1301 of 1902.

*Adverse Possession, Acts constituting—Public Road.*

*Held*, that in India acts like penning cattle, storing brick and timber in mud platform raised on a public road adjoining one's house, will not amount to adverse possession. *Framji v. Goculdas*<sup>1</sup> followed.

C. Sankaran Nair for appellant.

R. Kuppusami Aiyar for respondent.

Benson, J.  
Boddam, J.  
1904, November 1. } C. M. A. No. 72 of 1904.

*Attachment in execution of a decree—Decree modified on appeal—  
Effect of attachment.*

The plaintiff brought a suit for partition and obtained a decree against 1st defendant and his sons defendants 2 to 5. In execution of a p rtion of the decree which related to the award of money, the properties of defendants 1 to 5 were attached. Meanwhile the defendants appealed to the High Court against the decree; and on the appeal, the High Court "in total reversal" of the decree of the lower court passed another decree in favour of the plaintiff, that too for money, the amount having been arrived at by a process of calculation different from the one adopted by the lower court, and held at the same time the 1st defendant's share alone was liable for the amount. On the very day the decree of the High Court was passed the 1st defendant died. The plaintiff sought to execute the High Court's decree treating the attachment obtained in execution of the lower court's decree as subsisting.

The Sub-Judge held that the prior attachment was subsisting and that the plaintiff could proceed by sale of the attached property. Hence this appeal wherein it was contended that the prior attachment had died out and that the first defendant, the father, being dead and his share having gone to his sons by survivorship, plaintiffs' only remedy was by a separate suit.

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1. I. L. R., 16 B. 338.

*Held* that the decree of the Sub-Judge was in effect only modified by the High Court, both being for money even though the amounts were arrived at by different process of calculation and that the attachment in execution of the lower court's decree was subsisting in so far as the father's share was concerned.

*Lala Jagat Narain v. Tulsi Ram*<sup>1</sup> distinguished.

*V. Krishnaswami Aiyar* and *K. Srinivasa Aiyangar* for appellant.

*T. Rangachariar* and *T. Natesa Aiyar* for respondent.

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<i>Benson, J.</i> <i>Boddam, J.</i> 1904, November 1.	}	<i>C. M. S. A. No. 96 of 1904.</i>
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*S. 258, C. P. C.—Mortgage decree—Transfer of Property Act, S. 90.*

The decree-holder applied for further order under S. 90, Transfer of Property Act, after selling the mortgaged property. The plea of payment out of Court was pleaded by the judgment-debtor and was allowed by the courts below on the ground that the court acting under S. 90, Transfer of Property Act, was not an executing court and that S. 258, C. P. C., was not applicable to mortgage-decree, not being a decree for money.

*Held*, following the Full Bench case in *Mallikarjunadu v. Lingamurti*<sup>2</sup> that the proceedings under S. 90, Transfer of Property Act, are proceedings in execution and that S. 258, C. P. C., governs execution of mortgage-decrees, being decrees under which money is payable. *Mallikarjuna v. Narasimha*<sup>3</sup> overruled.

*A. S. Balasubrahmaniam Aiyar* for appellant (decree-holder).

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<i>Subrahmaniam Aiyar, J.</i> <i>Davies, J.</i> 1904, November 9.	}	<i>A. No. 72 of 1902.</i>
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*C. P. C., S. 244—Execution of decree—Subsequent dispossession—Fresh cause of action.*

Payyath Nanu Menon instituted O. S. No. 39 of 1892, (Sub-Court, Calicut) to have it declared that defendants were not validly adopted into the plaintiff's Tarwad, and to recover posses-

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1. 1 B. L. R. A. C. J. 71.    2. 1 L. R., 25 M. 244.    3. 1 L. R., 24 M. 412.

sion of the properties in defendant's possession, on the ground that plaintiff was the sole surviving member of the Tarwad. The Sub-Court gave Nanu Menon decree for possession as karnavan of the Tarwad, holding that defendant's adoption into the plaintiff's Tarwad was valid. Nanu Menon executed the Sub-Court's decree and obtained possession through Court. Nanu Menon preferred an appeal to the High Court and the High Court held that the defendant's adoption was invalid, and confirmed the Sub-Court's decree in other respects. The Privy Council confirmed the High Court's decree. Nanu Menon having died pending the appeal to the High Court, the defendants obtained possession of the properties after Nanu Menon's death. The present suit was filed by the executor under Nanu Menon's will for possession of the properties. The defendants pleaded that the plaintiff's remedy was to obtain possession by executing the decree of the Privy Council, and the present suit was barred by section 244, C. P. C. The Sub-Court decreed the plaintiff's suit.

*Held* : dismissing the defendant's appeal, that the suit was not barred by section 244, C. P. C. The testator having executed the former decree of Sub-Court and having been put into possession in execution, the defendants having obtained possession afterwards gave the executor a fresh cause of action for which a fresh suit lay.

*V. Krishnaswami Aiyar and A. Nilakanta Aiyar for appellant.*

*V. Bhashyam Aiyangar, P. R. Sundara Aiyar and C. V. Ananta Krishna Aiyar, Vakils for respondent.*

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<i>Benson, J.</i> <i>Boddam, J.</i> 1903, November 26.	}	<i>C. R. P. No. 322 of 1903.</i>
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*C. P. C., S. 561—Memo. of objections between co-respondents.*

One respondent can file a memorandum of objections against another respondent. S. A. No. 1657 of 1898 followed.

*V. Ryru Nambiyar for appellant.*

*T. Richmond for respondent.*

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Chief Justice,  
and  
Subrahmania Aiyar, J. } S. A. No. 1876 of 1902.  
1904, November 28.

*Jurisdiction of Appellate Court—Suit by vendee for possession and in the alternative for return of purchase money—Decree for return of purchase money against vendor—Appeal by vendor impleading vendee and person in possession—Reversal of decree and decree for possession as against person in possession.*

Suit by vendee for possession of the property purchased in the possession of defendants 1 and 2 or in the alternative for return of price paid as against the vendor (the 3rd defendant). The District Munsif found that the vendor's title was barred by limitation and gave plaintiff a decree for return of the price paid. On appeal by the vendor, the Sub-judge found the title of the vendor to be subsisting, reversed the decree as against the vendor and "as a necessary result of his finding on title" gave plaintiff a decree for possession as against defendants 1 and 2 though the plaintiff did not put in a memo of objections for that relief. On second appeal,

*Held*, that the Sub-Judge had no jurisdiction to pass a decree for possession in favor of plaintiff as against the respondents (defendants 1 and 2) in the absence of an appeal or memo of objections by plaintiff.

*M. R. Ramakrishna Aiyar* for appellant.

*A. S. Balasubrahmanya Aiyar* for 1st respondent, plaintiff.

*V. Krishnaswami Aiyar* for 2nd respondent, vendor.

Boddam, J. } Cr. R. C. No. 368 of 1904.  
1904, December 1.

*I. P. C., S. 193—Perjury, conviction for—Deposition not taken in accordance with law—Cr. P. C., S. 182.*

A deposition made in a civil case not taken in accordance with law is not admissible in evidence in a prosecution for giving false

evidence contained in the said deposition. A conviction based on such false evidence cannot stand.

In this case, the deposition was not read out to the witness in the presence of the court and the parties or their pleaders as required by S. 182, Cr. P. C.

*Held*, that neither the deposition nor any secondary evidence of what the accused deposed was admissible in evidence.

*V. Krishnaswami Aiyar and S. Srinivasa Aiyar* for accused.

*The Public Prosecutor (E. B. Powell)* for the Crown.

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<p><i>Subrahmania Aiyar, J.</i>  <i>Boddam, J.</i>  1904, March 1.</p>	}	<p><i>A. No. 116 of 1901.</i></p>
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*C. P. C., S. 361—Suit by reversioner for declaration—Suit dismissed—Decree for costs against reversioner—Appeal by reversioner—Death of reversioner pending appeal—Right to continue appeal by plaintiff's son the then next reversioner.*

A reversioner sued to have it declared that certain alienations made by the widow were not binding upon him. The Subordinate Judge dismissed the suit with costs. Pending appeal by the reversioner, he died, and his son sought to proceed with the appeal, claiming to be the then next reversioner.

*Held*, that the son could not claim to continue the appeal as the suit by his father had abated by reason of his death.

*P.R. Sundara Aiyar and K. Ramachandra Aiyar* for appellant.

*V. Krishnaswami Aiyar and S. Srinivasa Aiyar* for respondents.

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## RECENT CASES.

Chief Justice,  
Subrahmanya Aiyar, J.  
1904, December 20.

} C. M. S. A. No. 31 of 1934.

*Appeal—Execution Proceedings—Res judicata—Rate of interest to be allowed in restitution.*

The plaintiff obtained a decree for money against the defendant and pending appeal by the latter executed the decree and realised the money. On appeal the decree was reversed and the plaintiffs suit was dismissed with costs. Thereupon the defendant applied for restitution of the amount realised by the plaintiffs together with interest at 12 p. c. per annum. Notice was issued to the plaintiffs calling on them to show cause why execution of the decree applied for by the defendant should not be granted. The plaintiffs did appear and the court ordered warrant to issue. The defendant not having paid *batta* no warrant was issued and his application for execution was stuck off. The defendant again applied for restitution claiming interest at 12 p. c. Notice was given to plaintiffs and the plaintiffs appeared and contended that interest at 6 p. c. alone ought to be granted. The court held that the plaintiffs were bound by the previous order and ordered them to pay interest at 12 p. c. The plaintiffs asked for ten days' time to pay and the court adjourned the application for execution accordingly. The plaintiffs appealed on the ground that interest at 6 p. c. alone ought to have been awarded and that the matter was not *res judicata*. The District Judge allowed the contention of the plaintiffs and reduced the rate of interest to 6 p. c. The defendant preferred the second appeal, on the grounds that no appeal lay to the District Court and that the matter regarding the rate of interest was *res judicata*.

*Held*, that an appeal lay to the District Court from the decision settling the rate of interest under Ss. 2, 244 and 540, C. P. C.

2. that the matter regarding the rate of interest was not *res-judicata* as the notice given to the plaintiffs on the occasion did not give any intimation that restitution was applied for with interest at 12 per cent, and

3. that award of 6 p. c. was proper.

*Sheik Budan v. Ramachandra*<sup>1</sup> and C. M. S. A. 25 of 1903 followed.

*T. R. Ramachandra Aiyar* for appellant.

*M. B. Sankara Aiyar* for respondents.

Chief Justice.  
 Davies, J.  
 1905, January 1. } C. M. S. A. No. 68 of 1904.

*Limitation Act, S. 12.*—"Time Requisite for obtaining a copy."

The 90 days time allowed for filing appeal expired on 28th April 1904. The District Court closed for the Summer vacation on the 18th April 1904. Application for copies of judgment and order was put in on 20th June 1904, the date on which the District Court re-opened after the vacation. Copies were supplied on 22nd June 1904 and this appeal was filed on the re-opening day of the High Court i. e., on 11th July 1904. *Held*, that the time between 18th and 28th April 1904 is not time requisite for obtaining copy of judgment within the meaning of S. 12 of the Limitation Act.

*Tukaram v. Pandurang*<sup>1</sup> and *Pandharinath v. Shankar*<sup>2</sup> distinguished.

*T. Pattabhiramaiyar* for appellant.

*C. Venkatasubharamiya* for respondent.

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Chief Justice.  
 1905, January 18. } C. R. P. No. 160 of 1904.

*Auction Purchase—Default to produce two copies of sale certificate—Forfeiture to Government—Refusal to confirm sale.*

An auction-purchaser after duly paying the purchase money failed to produce in time two copies of sale certificates under condition No. 9 of the conditions of sale in the Proclamation of sale whereupon the District Munsif declared the amount forfeited to Government under condition No. 10 and ordered a resale.

*Held*, that condition No. 9 is no condition within the meaning of the word in condition No. 10, that if it was a condition within condition No. 10 the rule was *ultra vires* as opposed to S. 312, C. P. C. and the conditions 9 and 10 have now in fact been deleted and that the order forfeiting the money and refusing to confirm the sale should be set aside.

*T. R. Venkatarama Sastri* for *P. S. Sivaswami Aiyar* for petitioner.

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1. I. L. R., 25 B. 584.

2. I. L. R., 25 B. 586.

Davies, J.  
 Benson, J.  
 1905, January 18.

} A. S. No. 107 of 1902.

*Hindu law—Adoption—Co-wives—Right of elder widow to adopt—Consent of junior widow.*

The senior of two widows can make an adoption with the assent of sapindas without consulting the wishes of the junior widow in the matter. The adopted son will also divest the estate of the junior widow.

*T. R. Ramachandraiyyar* for appellant.

*P. S. Sivaswami Aiyar* and *S. Kasturirangaiyengar* for respondent.

Subrahmania Aiyar, J.  
 Roddam, J.  
 1905, January 18.

} A. S. No. 122, 123, 127, of 1901.

*Hindu Law—Joint family—Possession by some members.—Exclusion—Mesne profits—Liability—C. P. C. 56i.*

Where in a joint Hindu family a member is excluded from enjoyment and the rest are in possession of various portions of family property, the excluded member cannot claim mesne profits to which he may be entitled *jointly and severally* from all the members in possession. The members in possession are liable only severally and to the extent to which they are, if at all, in possession in excess of their share.

(Memoranda of objections between co-respondents were heard and decided in this case, as, their Lordships remarked, it was now well established that they lie between co-respondents. See Notes p. 34 :—Ed).

Subrahmania Aiyar, J.  
 Davies, J.  
 1905, January 19.

} A. No. 237 of 1901.

*Act XX of 1863, S. 18—Suit for removal of trustee—Trustee's death pending suit—Costs to come out of trust estate.*

When a trustee is guilty of a breach of trust and a suit is brought to remove him, and he dies pending the suit, the court can order that the costs of the plaintiff should come out of the temple funds. S. 18 of Act XX of 1863 is only an enabling section.

*Sir V. Bhashyam Aiyangar* for appellant.

*L. A. Govinda Raghavaiyyar* for respondent.



Subrahmania Aiyar, J. }  
 Davies, J. } A. No. 236 of 1901.  
 1905, January 19.

*Religious Endowment—Hereditary trusts—Jurisdiction of courts to frame a scheme and to appoint additional trustee.*

Courts in India can appoint additional trustees, even though such appointment involved a departure from the arrangement contemplated in the constitution of the trust. The word “under the trust” in S. 539 do not mean only in conformity with the original constitution of the trust or with the rules now in force with respect to it. There is nothing to prevent a court from framing a scheme *inter alia* for the appointment of an additional trustee or the creation of a controlling body such as that sanctioned in *Chintaman v. Dhondo*<sup>1</sup> and *Annaji v. Narayan*<sup>2</sup>.

*Sir V. Bhashyam Aiyangar* for appellant.

*L. A. Govindaraghava Aiyar* for respondent.

Davies, J. }  
 Benson, J. } A. S. No. 174 of 1902.  
 1905, January 19.

*Equitable sub-mortgagee—Mortgage—Deposit of mortgage deed—Mofussil property—Account—Limitation—Deed of agency.*

A mortgagee may create a sub-mortgage by deposit of title deeds, namely, his own mortgage deed with or without such of the title deeds of the mortgagor as may be in the possession of the mortgagee.

Under S. 59 of the Transfer of Property Act an equitable mortgage may be created by a contract at Madras even though the properties covered by the mortgage are outside Madras.

A registered deed of agency provided that the agency should continue for 3 years that after the expiration of the period accounts should be taken and that if any moneys were found due to the agent, the principal should pay the same both personally and on the security of certain properties. Within 6 years but more

1. I. L. R., 15 B. 612.

2. I. L. R., 21 B. 556.

than 3 years from the termination of the agency, the agent brought this suit to take accounts and to recover the amount that might be found due from the defendants both personally and on the security of the mortgaged properties.

*Held*, that the suit was barred under Art. 85 of the Limitation Act, that the suit was not governed by Art. 116 and that as no amount could be found due (the suit being barred under Art. 85) no decree for sale could be passed.

*P. S. Sivaswami Aiyar* for appellant.

*T. V. Seshagiri Aiyar* for respondent.

<p>Full Bench.  <i>White, C. J.</i>  <i>Subrahmania Aiyar, J.</i>  <i>Davies, J.</i>  <i>Benson, J.</i>  <i>Boddam, J.</i>  1905, January 23.</p>	}	<p><i>Cr. R. C. No. 463 of 1904.</i></p>
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*Indian Penal Code, Ss. 463, 464*—“*Dishonestly and fraudulently*”—  
“*Claim or title*”—*Presenting a spurious certificate of good character in accordance with bye-law 131 of the Madras University.*

In accordance with Bye-law 131 of the Madras University, the petitioner forwarded a spurious certificate that he is of good character and had completed his twentieth year with the view of being exempted from producing the attendance certificate otherwise required by bye-law 129. It was admitted that the petitioner fabricated the signature of one Dr. Wolffe, that he forwarded the certificate to the Registrar and that he did so for the purpose of being admitted to the examination.

*Held*, by the majority (*Subrahmania Aiyar* and *Davies, JJ.* dissenting) that the act constituted the offence of forgery within the meaning of S. 463, I. P. C.

Per *Subrahmania Aiyar, J.* :—

The spurious document in question was not made *fraudulently* within the meaning of Ss. 463, 464, I. P. C.

*Per Davies, J* :—The act did not fall within the definition of forgery within the meaning of S. 463 I. P. C.

*T. Rangachariar* for petitioner.

*The Crown Prosecutor (John Adam)* for the Crown.

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<p><i>Chief Justice.</i>  <i>Subrahmania Aiyar, J.</i>          1905, January 26.</p>	}	<p>S. A. No. 1600 of 1902.</p>
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*Limitation—Sale for arrears of rent—Act VIII of 1865—Plaintiff not party to the sale—Suit for declaration.*

A tenant sold his holding to the plaintiff in this case in 1895. In 1900, the holding was sold under S. 38, Act VIII of 1865, for arrears of rent after notice to the vendor of the plaintiff. Plaintiff brought this suit for a declaration that the sale was not binding on him. The suit was brought after the expiry of one year from the date of sale in 1900 :—*Held*, that as the plaintiff had purchased the tenant's rights in 1895, no interest in the lands remained in him to pass under the sale in 1900. *Held* further that as the plaintiff was not a party to the proceedings resulting in the sale for arrears of rent, he was not bound to set aside the sale within one year, and that the ordinary period of limitation prescribed for a declaration applied to the case.

*T. V. Seshagiri Aiyar* for appellant.

*K. N. Aiyar* for first respondent.

*Ex. J. 14.*  
9 21 '05













